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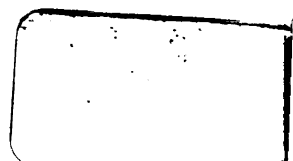
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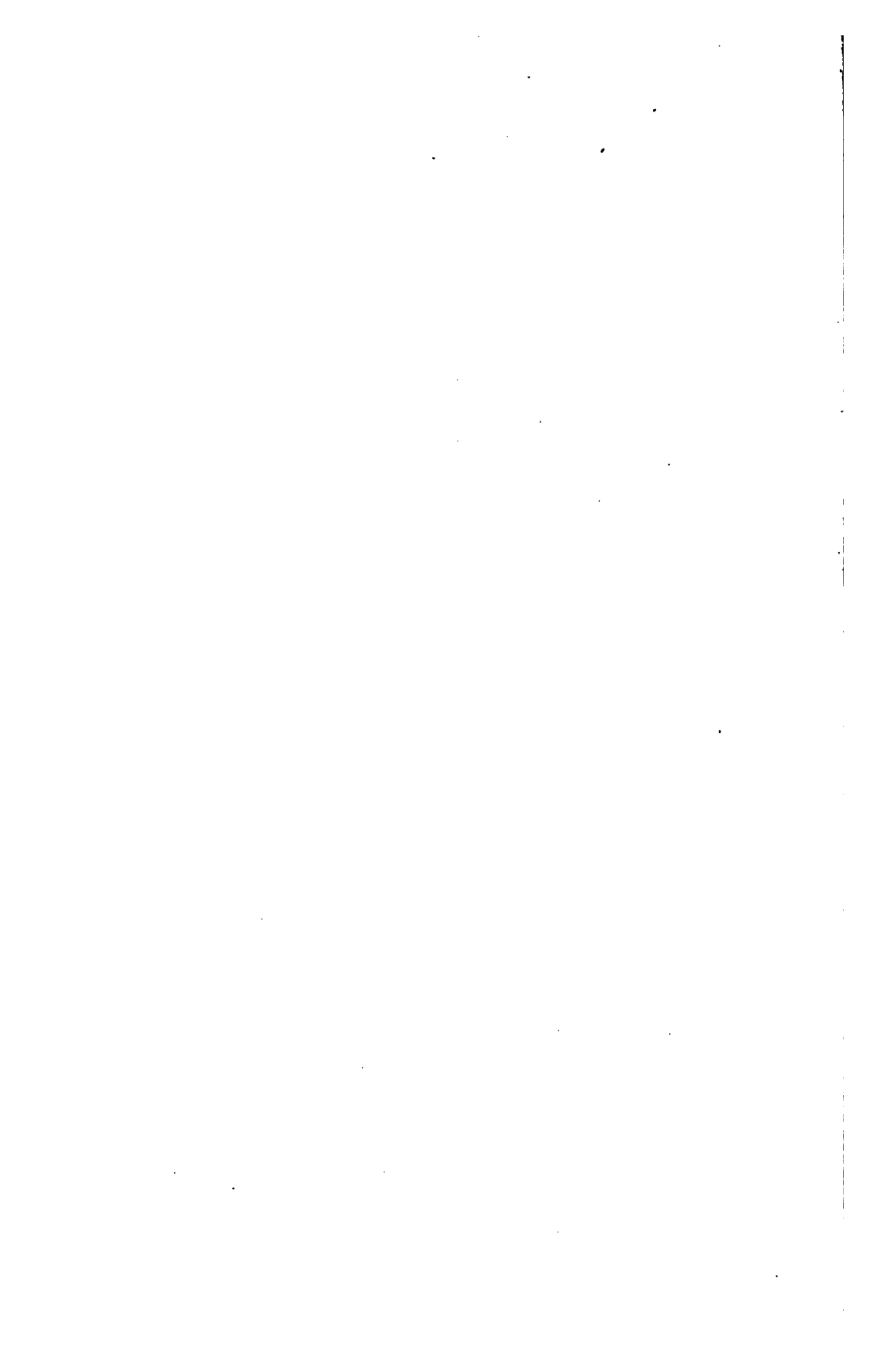












THE

CINCINNATI

# SUPERIOR COURT REPORTER.

EDITED BY

CHARLES P. TAFT AND BELLAMY STORER, JR.

VOL. I.

OCTOBER TERM, 1870—DECEMBER TERM, 1871.

CINCINNATI:  
ROBERT CLARKE & CO.  
1872.

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*Rec. Oct. 30, 1872*

**JUDGES**  
**OF THE**  
**SUPERIOR COURT OF CINCINNATI,**  
**1870-71.**

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**HON. BELLAMY STORER,\***  
**HON. ALPHONSO TAFT,\***  
**HON. MARCELLUS B. HAGANS.**

**\*Resigned January 1, 1872. Governor Hayes appointed Hon. JOHN L. MINER and Hon. J. BRYANT WALKER to fill the vacancies.**

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CINCINNATI  
SUPERIOR COURT  
Reporter.

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GENERAL TERM,  
OCTOBER, 1870.

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THE MERCHANTS' NATIONAL BANK v. PROCTER & GAMBLE.

The taking a Clearing-house manager's warrant for the surrender of a check, if the check be afterward dishonored, is not payment of the check, unless made so by special agreement, or by *laches* on the part of the holder. The holder of a check is entitled to wait until the day following its date before presenting it to the drawee, without discharging the drawer from liability. Such delay is not *laches* in the holder.

A., the holder of a bank check drawn by B. on C., presents it, on the day of its date, at the Clearing-house, and, after adjustment of the accounts between the various banks (his own among the number), receives, in settlement, the warrant of the manager of the Clearing-house on C. The next day A., having presented the manager's warrant to C., who refuses payment, the original check is obtained from the Clearing-house, presented to C., dishonored, protested, and notice thereof given to B. *Held*: that B. is liable to A. for the amount of the check.

This was a suit on the following check:

"No. 5,676.

"CINCINNATI, August 25, 1869.

"Homans & Co. pay to Mr. N. S. Jones or order three thousand and twenty-five fifty-five-hundredths—\$3,025.55.

"PROCTER & GAMBLE."

Indorsed "N. S. Jones."

C. S. C. REP. VOL. 1—1

The plaintiff alleges that Jones indorsed to it, and that it is the holder and owner of the check; that it was presented to Homans & Co. on the 26th of August, 1869, and payment demanded and refused, of which refusal defendants were notified the same day. The plaintiff asks judgment.

The defense is a denial that the plaintiff is the holder and owner of the check; they admit they drew the check, and aver that on the day of its date it was presented to Homans & Co. for payment, and paid in part in checks on other banks, in Cincinnati, and in part by a check of a voluntary association, known as the Clearing-house, and that being so paid, the check was on the day delivered by plaintiff to Homans & Co., who charged it up to the defendants and canceled it. They also allege that they had funds on that day on deposit with Homans & Co., more than sufficient to pay the check, and that on the next day, the 26th of August, 1869, Homans & Co. became insolvent. They deny that the check was legally presented on the 26th of August to Homans & Co. for payment, the same having been already paid, delivered to drawees, and canceled on the 25th of August; and they admit notice on the next day, of presentment, demand, and refusal to pay. They ask to be dismissed with costs.

An agreed statement of facts was filed, and the case was reserved to general term.

From the agreed statement of facts, it appears that the Clearing-house Association is a voluntary and unincorporated association of banks and bankers in Cincinnati, both incorporate and private, which had agreed to be governed by certain articles, which are set out fully. Among other things, these articles provide for officers of the association, suitable rooms, furniture, clerks, and prescribe the duties of the manager. Article fifth provides, "That the hour for making exchanges shall be at 2:15 P. M., when messengers from all the associated banks and bankers shall appear with their respective demands, separately made out against

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The Merchants' National Bank v. Procter & Gamble.

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each bank and banker, and the totals summed up. At three o'clock they shall return for settlement, when the manager shall issue his check or warrant upon the debtor banks or bankers for the balance, which checks shall, on presentation, be settled promptly by the debtor to the satisfaction of the creditor, in whose hands alone they are to be available."

For a long time previous to the failure of Homans & Co. the members of the association caused to be posted in their places of business in a conspicuous place, near their respective counters, a printed notice in illustrated type, to the effect that checks on banks in this city deposited after 1:45 P. M. could not be collected until the ensuing day, and were at the risk of the depositor until collected.

Article sixth provides, "In case of failure to respond promptly to the checks of the manager on the part of any member of the association, they shall be immediately returned to the manager, who shall call upon the other banks or bankers to make up the sum for which payment has been refused, in proportion to the checks upon the defaulting member sent into the Clearing-house at the preceding settlement, which sums so furnished or contributed shall constitute claims in the hands of the responding members respectively against the defaulting member; and it is hereby agreed that the checks received from the Clearing-house by the defaulting members shall be delivered, if required, to the members owning the same, without mutilation. The agency of the Clearing-house, it is understood, is only as a trustee, and in no case is the association to be held responsible for any loss that may occur."

The practical operation of the Clearing-house previous to, and on the date of the check sued on, was as follows:

There were tables in the room, divided into separate spaces for each bank. A clerk from each bank, at 2:15 each day, attended with the checks held against the other members; the checks against each bank pinned up in a separate package, with an accompanying ticket for each

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The Merchants' National Bank v. Procter & Gamble.

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package, with each check noted on it, and the whole footed up; and also with a separate list of the total amounts held against each bank also footed up for the use of the manager.

The manager charges each bank with the total of checks held against it by the other banks contained in the list made by its clerk in the Clearing-house and credits it with the total of checks held by it against the others.

It was agreed that the check sued on was drawn on the day of its date to the order of N. S. Jones, who indorsed the same and deposited it with plaintiffs before 12 m. of the same day, the amount being placed to his credit on the books of the plaintiff, who was the owner thereof; that on the same day this check, with a similar check on Homans & Co., for \$70.15, was in the regular course of business sent by the plaintiff to the Clearing-house, making the total amount held by plaintiff against Homans & Co. that day \$3,095; that on the same day Homans & Co. held against plaintiff on said Clearing-house a check for \$581; that plaintiff on August 25, 1869, had credits on the books of the Clearing-house for \$99,349.70, and a debit of \$79,262, leaving a balance to its credit of \$20,087.70; that Homans & Co. had credits on the same day on the books of the Clearing house \$3,078, and debits \$58,281, leaving a debit balance of \$55,202; that the credit balance on that day due to plaintiff was settled by two checks drawn by the manager of the Clearing-house, one of which was as follows:

“CLEARING-HOUSE, *August 25, 1869.*

“HOMANS & Co.: Pay to Merchants' National Bank, or order, \$12,207.

G. P. BASSETT, *Manager.*”

The two checks on Homans & Co. for \$3,025.55 and \$70.15, making \$3,095.70, were sent to the Clearing-house by plaintiff, and were delivered to the clerk of Homans & Co. by plaintiff's clerk, and were taken by Homans & Co.'s clerk to their banking house, and were canceled, and were charged by Homans & Co. on their books to the account of defendants. On August 26, 1869, Homans & Co stopped payment.

The manager's check for \$12,207.70 was on that morning

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The Merchants' National Bank v. Procter & Gamble.

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presented to Homans & Co. for payment, and refused. Thereon plaintiff returned the manager's check to the Clearing-house on the same day, and contributed an amount equal to the full amount of the checks held by it on Homans & Co. to make good the dishonored check. The plaintiff presented the check sued on during business hours at the office of Homans & Co., and demanded payment, which was refused, and the same was protested, and notice given to defendants.

It was agreed that all checks presented at the office of Homans & Co. on the 25th of August were paid.

*Stanley Matthews* and *King, Thompson & Avery*, for the plaintiff, made the following points:

1. That the holder of a check has, during business hours of the day following its date, to present it for payment. 2 *Parsons on Notes and Bills*, 72; *Thompson on Bills*, 119; *Byles on Bills* [13]; *Lovett v. Cornwell*, 6 Wend. 369; *Merchants' Bank v. Spicer*, 6 Wend. 443; *Mohawk Bank v. Broderick*, 13 Wend. 133; *Koffi v. Underhill*, 3 Sandf. Ch. 277.

2. That the drawer is bound, unless he suffers loss through the *laches* of the holder, or a substitution is made of some third party as the debtor instead of the drawer, or the bank is so dealt with as to make it the debtor to the loss of the drawer.

3. That novation is entirely a matter of agreement. 2 *Am. Leading Cases*, 241 (notes); *Bottomley v. Untall*, 5 C. B. [N. S.] 122; *In re L. B. v. S. S. Bank*, 11 Jur. [N. S.] 216.

4. That taking a check in payment of a bill does not operate as an absolute payment, if the check is dishonored, unless the drawer suffers loss through the *laches* of the holder. *Vernon v. Bouverie*, 2 Show. 296; *Hoar v. Chute*, 15 Johns. 224; *Powell v. Roach*, 6 Esp. 76; *Olcutt v. Rathbone*, 5 Wend. 490; *Everett v. Collins*, 2 Campb. 515; *Gillard v. Wise*, 5 B. & C. 134; *Russell v. Hankey*, 6 Term R. 12; *Stringfield v. Lanebarre*, 16 L. T. (N. S.) 461.

5. Wherever a check has been received in payment of a

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The Merchants' National Bank v. Procter & Gamble.

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bill by the holder, it is not the receipt of the check which discharges the drawer and indorsers, but the whole stress is laid upon the delivery of the bill to the acceptor, which disables the former holder from producing it when he calls upon the drawer and indorsers for payment. Byles on Bills, [177]; Chitty on Bills, 438; Story on Bills, section 419; Story on Notes, section 389 n; Thompson on Bills, 256.

6. That the Clearing-house warrants are not checks or contracts at all, but mere certificates, and therefore no novation or payment could have taken place.

7. That the drawer of a check is the principal debtor. Parsons' Merc. Law, 90; Smith's Merc. Law, 248, notes; 2 Parsons on Bills and Notes, 58; Byles on Bills [10], notes; *In re Brown*, 2 Story's R. 502.

8. That if the check on the plaintiff, sent into the Clearing-house by Homans & Co. was a partial payment of the check in suit, the demand on the 26th of the full amount by the plaintiff from the defendants is no defense, unless: 1. Payment was refused on that account; 2. The smaller amount would have been paid if demanded. And the burden of proof of these facts is on the defendants.

9. That sufficient notice of presentment and non-payment was given, unless the defendants were actually damaged thereby, and the burden of proof of this is also on them. Byles on Bills [213-217]; Story on Bills, § 390; Chitty on Bills, 299; Thompson on Bills, 332, *et seq.*; Smith's Merc. Law, 309; 1 Parsons on Notes and Bills, 474; *Shelton et al. v. Braithwaite*, 7 M. & W. 436; *Stockman v. Parr*, 11 M. & W. 809; *Mills v. Bank of U. S.*, 11 Wheaton 431; *Bank of Alexandria v. Swann*, 9 Peters, 83; *Ontario Bank v. Petrie*, 3 Wend. 456; *Bank of Rochester v. Gould*, 9 Wend. 279; *Cayuga Bank v. Warder*, 1 Coms. 413; S. C. 2 Seld. 9; *Young v. Lee*, 18 Barb. 187; *Hodges v. Shuler*, 24 Barb. 68; *Tobey v. Lenning*, 2 H. (Penn.) 483.

As to checks passing through Clearing-house. *Prideaux v. Criddle*, 4 L. R. Q. B. 455; *Merchants' Bank v. Eagle Bank*, 101 Mass. 291.



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The Merchants' National Bank v. Procter & Gamble.

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*Hoadly, Jackson & Johnson, and Collins & Herron*, for defendants, made the following points.

1. That by the custom of the Cincinnati banks, checks deposited after 1:45 P. M. of each day are at the risk of the depositors and not collectible until the ensuing day. Hence, it follows that checks deposited before 1:45 P. M. are to be presented on the day of deposit and not later.

2. The check sued on was in fact presented and payment demanded, as partly made, on the day of its deposit (August 25). The Clearing-house was a proper place for such presentment and demand. *Reynolds v. Chettle*, 2 Campb. 596; *Harris et al. v. Packer*, 3 Tyrerwhitt, 370. It was presented at the Clearing-house and payment in fact demanded. It was, therefore, on that day either paid or refused payment. No sufficient notice was ever given of such refusal. Story on Notes, section 350; 1 Parsons on Notes and Bills, 468; *Strange v. Price*, 10 Ad. & El. 125; *Townsend's Adm'r v. Lorain Bank*, 2 O. St. 845.

3. The surrender of the checks on Homans & Co. to them, and the drawing of a Clearing-house check, in favor of the Merchants' Bank, for the balance due it after settlement at the Clearing-house on August 25, constitute in law a payment of the checks drawn upon Homans & Co. and sent to the Clearing-house by the Merchants' Bank, so as to release the indorsers therefrom. Story on Notes, sections 242 and 389; Byles on Bills, 164; Chitty on Bills, 434; 1 Parsons on Notes and Bills, 367; *King v. Holmes*, 11 Penn. St. 456.

4. The demand and notice on August 26 were insufficient, because the entire amount payable by the face of the check was demanded, whereas the counter checks held by Homans & Co., and actually surrendered to the Merchants' Bank the previous day, constituted a credit on said check reducing the amount thereof. A demand for more than can legally be collected is not sufficient to put the drawer in the wrong or charge the indorser. 1 Parsons on Notes and Bills, 367; *Vergennes Bank v. Cameron*, 7 Barb. 143; *Whitwell v. Johnson*, 17 Mass. 449.

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HAGANS, J. It is apparent that the principal object in the establishment of the Clearing-house is to facilitate exchanges between its members. It is no longer necessary there should be a settlement by each bank with every other at their respective counters. It is a mere rendezvous of bankers' clerks, the manager a disinterested party whose salary is paid by each bank in proportion to its capital. The debit and credit balances on the books of the Clearing-house are not balances owing to or due from it. There is a manifest intention to make the Clearing-house totally irresponsible; and whether that intention can be effected in a proper case, the court is not now to consider.

The plaintiff, who was the holder of the check drawn by the defendants, had until the next day to present it for payment to Homans & Co. This we hold to be the law, according to the text-books and a very great number of decisions of the highest courts in this country and in England.

If the plaintiff had not passed the check through the Clearing-house, but presented it at the counter of Homans & Co., on the 26th of August, 1869, the day after its date, and had demanded payment, and it had been refused, and the defendants were notified thereof, it is admitted the defendants would be liable.

Was not this, in fact, done? The defendants claim:

1. That there was presentment and demand on the 25th of August to Homans & Co., at the Clearing-house, and that the check was either paid or dishonored. If paid, that is an end of the defendants' liability. If not paid it was dishonored, and defendants should have been notified, and the parties failing in that, defendants are discharged of damages.

2. That it was partly paid on the 25th of August, and a novation and postponement of the balance occurred, from which it is argued defendants are discharged.

3. That the drawers are not bound, because there was not a good demand on Homans & Co. on the 26th of August; that the demand was for too much.

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The first proposition made by the defendants assumes that what was done at the Clearing-house was a payment of this check so as to discharge the drawers. This proposition also involves one of the same questions that is presented in the second proposition. We think that it can not be said that the check was paid on the 25th of August, though it was delivered to Homans & Co., by them treated as canceled, and charged up to the defendants' account on their books. But we think a reference to the articles of association of the Clearing-house plainly shows that the manager's warrants were not intended to be regarded as payment; for the Clearing-house, as such, had no balances anywhere in which it had any interest and upon which it could draw. The association was, in no event, to be responsible, and the articles provide for this case. Under the very circumstance happening, the manager's warrant was returned, and the check sued on obtained according to the articles of association. It was clearly not intended to change the rights and obligations of the respective members of the association. On the contrary, it was intended that they should be in the same position, and no better or worse than on the old system, where settlements were made at the counter of the banks. Its warrants are not negotiable, and in this and other respects already mentioned, the warrants have not the characteristics of ordinary bank checks. They can not be regarded as payment until actually paid. Even taking an ordinary bank check is not always regarded as payment of a bill of exchange until actually paid. (Byles on Bills, 17.) And the delivery of a check to Homans & Co., and its cancellation and charge to defendants' accounts, does not vary the rights of the parties. In all the cases referred to, the principle that the delivery of the check discharges the drawer, goes upon the fact that thereby the holder would be disabled from producing it when he calls upon the drawer. But here the holder obtained the check, and demanded payment and protested it. And the cancellation by Homans & Co. could make no difference, nor add to the

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effect of its previous delivery, nor yet its previous debit to defendants' account. Homans & Co. did these things in their own wrong, and it was not in the power of the plaintiff to prevent them.

The check of a third person, received on the surrender of a note, without an express agreement that it shall be received in payment, is not payment, if the check is dishonored, and the fact that the check sued on was delivered up, charged, and canceled, is not conclusive that it was received absolutely and paid.

There must be proof that it was intended that the manager's warrant should be payment, or that it was so agreed by the parties, or that the *laches* of the creditor has been an injury to the debtor, none of which conditions appear in this case. *Merrick v. Bowry*, 4 O. S. 60.

We do not think, as this Clearing-house is constituted, that what was done there on the 25th of August can be said to be a presentment and dishonor of the check sued on. There is no evidence to sustain such a hypothesis. On the contrary, the check was received by Homans & Co., and charged up against the defendants on their books. We have seen that this transaction did not constitute a payment, nor yet a novation. And that there was not any *laches* to the loss of the defendants.

It is said, however, secondly, this check was partly paid on the 25th, by the surrender to plaintiff of the check for \$581, held by Homans & Co. upon them that day, and that thus the transaction amounted to a novation, so that defendants were discharged. But this check was substantially returned to the Clearing-house on the 26th, and the whole transaction stood as it did before the checks were exchanged, the plaintiff receiving back \$547, its proportion of the surplus left after making good the manager's dishonored warrant on Homans & Co. Besides, we do not think we ought to give any such effect as that claimed to the operations of the Clearing-house.

There was not the substitution of any new security, for

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these warrants of the Clearing-house were not checks legally, and of themselves amounted to nothing unless paid.

It is said, thirdly, that the check sued on ought to have been credited with the \$581, the amount of the check held by Homans & Co., and a demand made on Homans & Co. for the difference only, and that, therefore, the presentment and demand are not good. But this claim for \$581 was substantially surrendered to the Clearing-house. Homans & Co. made no such objection at the time, and it is incumbent on the defendants to prove that the smaller amount would have been paid, and they were not misled. Besides, the plaintiff took the check sued on in the usual course of business, to be collected for the depositor. If it were not paid, and the plaintiff performed its duty, though credited to the depositor on the books of the plaintiff, the plaintiff would have returned it to the depositor. The plaintiff was the mere agent for collection, and when it presented that check to Homans & Co., the alleged offset was not in the same right. It would not have been equitable to have required the plaintiff to credit the check which Homans & Co. had held against it. It is evident that defendants, on the 26th of August, so regarded it, as they offered to pay the whole amount, and were only prevented by the fact that the plaintiff had not yet got possession of it from the Clearing-house. The presentment and demand on the 26th were not only duly made, but were in time; and as the parties consent to credit the smaller check, the amount may be credited.

The Clearing-house is not only convenient, but useful, and its operations are approved by experience, and have been recognized by the courts in England, and perhaps in this country.

The defendants must be held liable, and judgment may be taken, less the credit agreed upon.

Judgment for the plaintiffs.

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W. W. Newcomb & Co. v. Daniel Weber.

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The counsel for the defendant in this case made application to the Supreme Court for leave to file a petition in error, which, on consideration, was refused.

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W. W. NEWCOMB & Co., Plaintiffs in Error, v. DANIEL WEBER, SHERIFF, ETC., Defendant in Error.

Under section 168 of the justice's act (1 S. & C. 799), a demand of jail fees by the sheriff from the creditor, and a refusal by him, are not necessary to justify the discharge of a prisoner. The creditor must pay the sheriff's fees without demand or notice from that officer.

**ERROR TO SPECIAL TERM.**—The facts of this case are presented in the opinion.

*Okey*, for plaintiffs in error.

*Hoadly, Jackson & Johnson*, for defendants in error.

HAGANS, J. This cause is here on error to a judgment dismissing the cause on demurrer to replies.

The petition discloses these facts: The plaintiffs below, who are plaintiffs in error here, commenced suit on the 22d of May, 1868, against W. E. Manning for \$300, before B. C. True, a justice of the peace, and, upon affidavit, procured an order of arrest addressed to a constable; that on the 25th of May, they obtained judgment against said Manning for \$287.75, and the order of arrest was sustained; that on the 9th day of April, 1869, said justice duly directed the constable to commit the body of Manning to the custody of the defendant, which the constable did, and on the same day, the defendant voluntarily suffered and permitted Manning to escape and go at large without plaintiffs' consent, the debt being wholly unpaid; and that Manning has absconded, being insolvent, and the debt is lost as against him. To the petition is annexed

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the order of arrest and the mittimus upon which the constable returns that he committed Manning to the jail.

To this petition the defendant answered:

1. That when he discharged Manning, there was no money in his (defendant's) hands to pay for the sustenance of Manning.

2. That Manning made affidavit that he had a family for which he provided, and in other respects made the statement required by section 170 of the act passed March 14, 1853 (1 S. & C., 799, *et seq.*), and that, therefore, he discharged Manning from custody

To this first answer, the plaintiffs replied:

1. That it was not true that the defendant discharged Manning from custody because there was no money in his hands for Manning's sustenance; but, on the contrary, Manning was discharged without any sufficient reason.

2. That defendant made no demand on plaintiffs, their agent or attorney, for fees for the sustenance of Manning, and that he was discharged without the defendant making known to the plaintiffs, their agent or attorney, that fees were required for such purpose; and,

3. That defendant discharged Manning from custody, pretending there was no money in his hands for the sustenance of Manning, without committing him to jail.

And to the second answer the plaintiffs demurred.

Thereupon the defendant demurred to the replies to the first answer. The demurrers were heard at the March term, 1870, and the judge overruled the demurrer to the first reply, and sustained it to the second and third replies, and exception was taken to the sustaining the demurrer to the third reply. The plaintiffs then filed an amended second reply, which substantially set out the fact stated in the replies named, with the averments that the plaintiffs, who were non-residents, were able, ready, and willing to advance fees for the sustenance of Manning if they had been required; all of which the defendant knew. To this amended second reply, the defendant demurred, and the

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court sustained the demurrer, and exception was taken. The plaintiffs then asked and obtained leave to withdraw their reply number one, and declining to file any other replies, the court dismissed the cause at the costs of the plaintiffs, and they excepted.

The cause stands here on the sufficiency of the third reply and the amended reply, and involves questions that may be stated thus:

1. Is the defendant liable for not actually committing Manning to jail; and,
2. Was it the duty of the defendant to demand fees of the plaintiffs for the sustenance of Manning before discharging him?

As to the *first question*, it is sufficient to state that the statement of the petition and the return of the constable to the execution is conclusive. The effect of the facts alleged in the petition can not be changed by a reply which contains new matter inconsistent with the petition. Code, sec. 101.

The constable performed his duty in committing the debtor to jail. The law does not impose the duty on the sheriff.

There remains the consideration of the second question. Section 168 of the justices' act (1 S. & C. 799), under which it is claimed the defendant was justified in discharging Manning from custody, reads as follows: "It shall be lawful for the sheriff or jailer, receiving any person imprisoned on execution issued in any civil proceeding, at any time when there is no money in his hands, to pay for the sustenance of such prisoner, to discharge him from prison. The jailer may, however, detain such prisoner, the adverse party being liable for such sustenance."

It will be perceived from the reading of the section, that the law does not, in terms, require a demand by the sheriff on the plaintiff in execution for money to pay for the sustenance of the prisoner, and the plaintiffs' refusal to comply, as a justification of the sheriff in permitting his



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prisoner to go at large. And, perhaps, the construction that the legislative intent was to require such demand and refusal as the condition of the sheriff's justification, would hardly have been claimed by the plaintiff, if the code, section 173 (2 S. & C. 996), had not provided that plaintiffs in arrests, by virtue of chapter 1, title 8, "shall, if *required by the jailer*, pay the jail fees weekly in advance."

This last section, it will be observed, does not provide for the discharge of the prisoner from custody by the sheriff, in case the creditor, if required, refuses to advance weekly the jail fees. And that was one of the questions decided by the Supreme Court of this State, in *Gill v. Miner*, 13 Ohio St. 182, where it was claimed that notwithstanding demand by the sheriff upon the creditor for jail fees, and refusal to pay, the sheriff was liable as upon an escape, if he permitted his prisoner to go at large. But the court say, "that when a judgment creditor, having resorted to the extreme remedy of imprisonment, makes default after due demand made, in providing for the subsistence of his debtor, he virtually assents to his discharge." The sheriff is not bound to subsist the prisoner and run the risk of never being paid for it. And then the court quote section 168 of the justices' act, and hold it to be so distinct an indication of the legislative policy in this regard as to render it safe to make it a rule of decision.

Undoubtedly, demand by the sheriff of the fees and refusal by the creditor, is the condition of the sheriff's justification for a discharge of his prisoner from custody, under section 173 of the code, because such demand and refusal are expressly required, and the discharge from custody, upon failure of compliance on the part of the creditor, necessarily follows. But the question recurs, does it follow that an omission of the demand by the sheriff, and refusal by the creditor, of the jail fees for sustenance of the prisoners, under section 168 of the justices' act, which it does not require, will make the sheriff liable as for as an

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escape, if he permit his prisoner to go at large, when there is no money in his hands to pay for the prisoner's sustenance.

The Supreme Court say, in the case cited, that while the terms of section 168 of the justices' act are broad enough to cover the question in that case, yet that "its application to cases of imprisonment, under process issuing from courts of record, is questioned."

We see no reason why, if the legislature made a provision for so important a matter, as the requirement of the creditor by the jailor, of the jail fees, in section 173 of the code, as a justification of the sheriff for a discharge of the debtor, that we should supply a legislative provision for such a requirement in section 168 of the justices' act. We derive no ground for the construction of section 168 of the justices' act claimed by the plaintiff, from its supposed analogy to section 173 of the code. In all cases of imprisonment of a debtor, it is our duty to construe the statute favorably to the personal liberty of the individual. It seems to be the policy of our laws relating to arrest for debt, to throw around the person of the debtor every proper safeguard, both of enactment by the legislature and of construction by the court. That there should be money placed in the sheriff's hands, under section 168 of the justices' act, for the sustenance of his prisoner, is the right of the sheriff, without demand of the creditor. When he concludes to invoke the extraordinary remedy of imprisonment for a debt within the jurisdiction of a magistrate, it is the duty of the creditor, without depending on or waiting for any one else, to follow the conclusion with prompt evidences of his intention to make that imprisonment effective. And this construction is strengthened by the concluding clause of the section which finally refers the sheriff's conduct in this regard to his own judgment.

Judgment affirmed.

PHILIP PENNYWIT AND CHARLES G. SCOTT v. SHELDON I.  
KELLOGG AND JOHN T. FOOTE.

In November, 1861, the relation existing between the people and State of Ohio, and the people and State of Arkansas, one of the Confederate States then waging war against the United States, was that of enemies, and the judicial proceedings under such Confederate State Government do not fall within section 1 of article 4 of the Constitution of the United States, which provides that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State."

The record of a judgment rendered in a court of such Confederate State of Arkansas, in November, 1861, against a citizen of the State of Ohio, is not competent evidence of indebtedness, although it may purport to show that process was served on the defendant prior to the commencement of the war.

Reserved from Special Term.

The case is fully stated in the opinion of the court.

*King, Thompson & Avery*, for plaintiffs.

*W. Y. Gholson; McGuffey, Morrill & Strunk*, and *George Hoadly*, for defendants.

TAFT, J. This action was brought upon a judgment in a suit commenced in Arkansas by the plaintiffs against the defendants, Kellogg and Foote, who were residents of Cincinnati before the war, and prosecuted to judgment during the war. The judgment was rendered on the 16th November, 1861. It appears from the pleadings and evidence, that Arkansas was engaged in the war against the United States at that time, and that the court which rendered this judgment, was a part of the Confederate State Government which was assisting to carry on the war.

The true relation, at that time existing between the people of any of the States in rebellion to the people of the loyal States, was determined in the Prize Cases, 2

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Black's Reports, 635. The decision was made in 1862, and turned upon the condition of things as existing in the summer of 1861, when the seizures of prizes were made, but a few months prior to the rendition of the judgment of Pennywit against Kellogg and Foote. This was even before the Act of Congress of July 13, 1861, ratifying the President's proclamation, and prohibiting all commercial intercourse except by permission of the President. Judge Grier, in giving the opinion of the court in the Prize Cases, stated the facts as well as the principle of law, which applied to and defined the condition of the people of the rebel States at that time.

The condition was held to be that of well-defined civil war, and the States in rebellion were at war with the other States and the United States; and the people of rebel States were to be deemed enemies of the people of the loyal States. On page 669, the court say: "It is not the less a civil war with belligerent parties in hostile array, because it may be called an 'insurrection' by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in a war, according to the law of nations."

The court, p. 673, define the situation thus:

"Under the very peculiar Constitution of this Government, although the citizens owe supreme allegiance to the Federal Government, they owe also a qualified allegiance to the State in which they are domiciled. Their persons and property are subject to its laws.

"Hence, in organizing this rebellion, they have *acted as States* claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the Federal Government. Several of these States have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign State. Their right to do so is

now being decided by wager of battle. The ports and territory of each of these States are held in hostility to the General Government. It is no loose, unorganized insurrection, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force—south of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile, and belligerent power.

"All persons residing within this territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their Government, and are none the less enemies because they are traitors."

It matters not, that no State can take itself out of the Union. When they choose to wage war on the General Government, and that portion of territory which is loyal to the General Government, they, both the hostile State and its people, are subject to the disabilities of enemies. They can not claim that the record of their judicial or other proceedings is entitled to faith and credit under the Federal Constitution, against which they are at war.

The rights under all contracts between people of hostile countries are suspended during the war. They may not be ultimately lost. But in time of war, they are not available. The result of the relation existing between the people of Arkansas and the people of Ohio is, that this judgment, rendered in time of war against a resident and citizen of Ohio, can not have any force in Ohio.

It ought not to have force, because the defendant could not lawfully defend in Arkansas. To allow a judgment to stand, under such circumstances, would violate the fundamental principle that every defendant must have his day in court. For although this defendant was served with process and appeared before the war, yet no man can be said to have his day in court, who has not the opportunity to continue in court till the trial and judgment. The

moment the state of war existed between Arkansas and the United States, it existed between all the people of Arkansas and all the people of Ohio, and no citizen of Ohio had any standing in any court in Arkansas. If the defendant had gone there, he would have been liable to imprisonment as an enemy in Arkansas, and to be punished by his own Government as violating its laws if he had attempted business intercourse in that State.

This we regard as the undoubted result of the adjudications of the Supreme Court of the United States and of other courts, in regard to the relation of the people of the rebel, to those of the loyal States during the war. (*Texas v. White*, 7 Wal. R. 727, 734.) In *Hanger v. Abbott*, 6 Wal. R. 532, it was decided "that the time during which the courts in the lately rebellious States were closed to citizens of the loyal States is, in suits brought by them since, to be excluded from the computation of the time fixed by the statute of limitations." The opinion of the court states the principle clearly, that the commencement of the war suspended all contracts and all remedies for the enforcement of contracts between enemies, or between the citizens of countries at war. The court say, pp. 540, 541, that "the suspension of the remedy during war is so absolute, that courts of justice will not even grant a commission to take testimony in an enemy's country." Lord Coke says, "*silent leges inter arma*," and adds, "that if a man is disseized in time of peace, and the descent is cast in time of war, this shall not take away the entry of the disseizee;" p. 541. The court say, p. 540, "Ability to sue was the status of the creditor when the contract was made, but the effect of war is to suspend the right, not only without any fault on his part, but under circumstances which make it his duty to abstain from any such attempt. His remedy is suspended by the acts of the two governments, and by the law of nations, not applicable at the date of the contract, but which come into operation in consequence of an event over which he has no control."

It is very clear that such a judgment must be regarded as *ex parte* and void. The original rights of the plaintiff, however, are not lost. If he has a cause of action against the defendant he can prosecute it. But this *ex parte* judgment can not be received in evidence against the defendant in Ohio.

If the plaintiff desires to try the merits of his original claim, we may entertain a motion to amend, and he may found his petition on that as his cause of action.

Judgment for defendant.

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GREAT WESTERN STOCK COMPANY, Plaintiff in Error, v. FELIX  
SAAS, Defendant in Error.

The Great Western Stock Company purchased of Felix Saas real estate, and received a warranty deed and the possession, in which it has not been disturbed, but it refuses to pay its notes for the deferred payments, on the ground that it is liable to be disturbed by the heirs of the wife of Ambrose Dudley after his decease, in consequence of a supposed defective conveyance by her.

*Held*, that the company, being in quiet possession under the deed, is bound to pay the notes and rely on the covenants in the deed for indemnity against any future eviction; that such is the settled construction of the contract between the parties; and that an act passed after suit on the notes, but a few days before judgment, authorizing a vendee in such a case to have the title investigated and damages for defect of title assessed and set off against the notes given for the purchase money, is not to be construed as applicable to existing deeds; and if it were necessary to so construe the act, it would be unconstitutional.

Felix Saas brought suit upon a note given for the purchase money of land, and the Stock Company brought suit to enjoin the collection of the note on the ground that the title to one-third of the land conveyed to the company by Saas was defective, being in the heirs of Martha C. Dudley, deceased, subject to the life estate of Ambrose Dudley, her surviving husband. The life estate of

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Ambrose Dudley was in Saas. The Great Western Stock Company is in peaceable possession, and anticipates no eviction till the death of Ambrose Dudley; but it has reason to believe that upon his decease litigation will commence, and it asks to be protected against having to pay for the land. This cause was before this court at General Term, on a former occasion, by reservation, to decide whether the heirs of Martha C. Dudley should be stricken from the original suit, of which they had been made parties on a previous motion. It was then held that the heirs of Martha C. Dudley were not proper parties to that suit, because their claim was no defense against the suit of Saas; that as there had been no eviction of the Stock Company, and as it was in quiet possession of the property, it could not refuse to pay the purchase money notes; that if the title should prove to be defective and the company should be evicted, its remedy was on the covenants in the deed. The court in that decision followed the ruling of the Supreme Court in *Hill v. Butler*, 6 Ohio St. Rep. 207.

The heirs of Martha C. Dudley were, therefore, on motion, dismissed from the suit, and the case was remanded for further proceedings; and such proceedings were had at Special Term, that a judgment was rendered against the Stock Company for the amount of purchase money due, to reverse which this petition in error is prosecuted

*W. M. Ramsey*, for plaintiff in error.

*James Saffin*, and *Caldwell, Coppock & Caldwell*, for defendant in error.

TAFT, J. The bill of exceptions presents but one question. It states that the Stock Company, on the trial, "offered evidence tending to prove that upon the death of Ambrose Dudley, the heirs at law of Martha Catherine Dudley, would be entitled to possession of the undivided one-fourth part of the premises described in the petition,



as tenants in fee simple, which evidence the court refused to hear," and the Stock Company excepted.

The trial was had, and the bill of exceptions allowed, at the May term, 1870.

On the 18th of April, 1870, a few days preceding the judgment, section 567 of the code was amended by the legislature so as to provide, that, "In all actions brought for the recovery of purchase money of real estate, by vendor against vendee, it should be competent for such vendee, notwithstanding his continued possession, to set up, by way of counter claim, any breach of the covenants of title acquired by him from the plaintiff, and to make any and all persons claiming any adverse estate or interest therein, parties to the cause; and upon the hearing he should be entitled to recourse against the plaintiff's demand for the present worth of any existing lien or incumbrance thereon, and if the adverse estate or interest of the said claimants should be an estate in reversion or remainder, or contingent upon a future event, the court may, at its discretion, require the vendee to surrender the possession to his vendor, upon the repayment of so much of the purchase money as shall have been paid thereon, with interest, or it may direct the payment of the purchase money claimed in the action, upon the plaintiff's giving bond in double the amount thereof, with two or more sureties, to be approved by the court, for the repayment of the same with interest, if the defendant and his privies of contract shall subsequently be evicted by reason of said defect."

This act appears not to have been published so as to be known to the court or the parties at the time of the trial. But it appears to have been in force, and the plaintiff in error claims that, by virtue of that act, if not otherwise, the testimony which they offered, was competent, and that to rule it out was error. We regard the decision made in General Term, on the motion to strike out the heirs of Martha C. Dudley as parties, as involving the competency of the evidence offered. From that

decision it necessarily followed, that the evidence in regard to the claim of Mrs. Dudley's heirs was not competent, unless made so by the act of April 18, 1870, which we have now recited. The effect of that act, therefore, is what we have to consider.

On the one side, it is claimed that this act, like the statute of limitations, affects the remedy and not the right under the contract. We think that, by the law as it had been long settled prior to the statute, no right of action could arise on the covenants in this deed for more than mere nominal damages, till the Stock Company should be evicted; and by the contract made between the parties, the purchasers were bound to pay the notes when they became due. These were the rights of the parties under their contract. It mattered not what form of remedy was adopted, the result would be the same. There was no substantial breach of the warranty until eviction. This was the legal construction of their contract. That relation having been established between these parties by contract, we think that the legislature could not change it. Nor do we consider the language of the amended statute such as to make necessary the construction claimed by the defendant. The statute may have its proper operation upon contracts to be made after its passage. The more natural construction of an act affecting substantial rights under contracts, is to hold that it contemplates future contracts only.

We hold, then, that this act does not apply to the covenants in this deed, and if it was intended so to apply, or had been so expressed, as to make it necessary for us so to construe it, we should hold that, as to contracts made before the passage of the act, it was unconstitutional and ineffectual.

Judgment affirmed.

JAMES F. JOHNSON AND WIFE, Plaintiffs in Error, v. J. H.  
PETTIT AND WIFE, Defendants in Error.

The forfeiture of a particular estate to the reversioner, under section 76 of the tax law (2 S. & C. 1464), is but an inchoate right until decreed by a court of competent jurisdiction.

Where the statute, for waste by a life tenant, forfeits the life estate to the reversioner before judgment of forfeiture is ordered, equity will allow the life tenant to repair the waste and save the forfeiture.

The facts appear in the opinion of the court.

*Logan & Randall*, for plaintiffs in error.

*Long, Hoeffler & Kramer*, for defendants in error.

STORER, J. The plaintiffs own the reversionary estate in real property, situated in Cincinnati; the defendants, in the right of Mrs. Pettit, claim a life interest therein as her dower. It is sought by the plaintiffs to forfeit her dower estate, on the ground that the defendants have allowed the property to be sold for taxes, without the redemption thereof by the dowress, within the time prescribed by law.

The cause was heard at Special Term, when it was decided the plaintiffs could not recover; to this judgment, exception was taken, and we are now asked to reverse it for the error of the judge in finding for the defendant.

We find, by the record, that the following facts were admitted or proved on the trial below:

1. The defendants had leased their estate to a tenant who had agreed to pay the taxes out of the rent, but omitted to do so.

2. The property was sold in January, 1866, for the taxes of 1864 and 1865, to Joseph McDougall, and on the first day of July, 1869, these taxes were paid to him with interest and penalty by the tenant, out of the rents, and the

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property was released from the lien they had created upon it.

This payment to McDougall was made while the present suit was pending, and before the case had been tried; and when it came to be heard, the court being satisfied the reversionary interest could not be affected nor disturbed by the sale to McDougall, to which he no longer held any claim, gave judgment for the defendants.

We suppose the object of the statute, which gives the right to forfeit a life estate to the reversioner, was to save him from the difficulties and entanglements which necessarily follow a tax sale, as well as the penalties precedent to the redemption of the property; but where no such state of facts exists, and the incumbrance is removed, the mere occurrence of a sale by the auditor does not of itself effect the destruction of the estate.

Thus it is when the tenant has forfeited his term by non-payment of his rent, and the landlord has entered, the tenant may still be relieved on the payment of the landlord's claim with interest and costs. All else would not be indemnity to the landlord, but rather the punishment of the tenant for being in arrear.

The plaintiffs rely upon section 76 of the tax law of 1859 (2 S. & C. 1464), which gives the right to the reversioner to forfeit the life estate, whether held by curtesy or as dower, where the tenant neglects to pay the taxes for so long that the land shall be sold for their non-payment, unless the same is redeemed within one year from the time of sale. The reversioner may redeem the lands in the same manner as other lands may be redeemed in other cases of sale for taxes. This section is a more explicit statement of the liability imposed upon the tenant for life, than we find in section 15 of the act for the assignment of dower, 1 S. & C. 521, where it is declared if the dowress shall wantonly commit, or suffer waste in the lands assigned to her, she shall forfeit that part of the estate in

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which such waste is committed to the reversioner in an action of waste.

Now, we can not construe either of these sections as creating a forfeiture *per se*, without the intervention of the proper tribunal to declare it. Like all other inchoate rights, it can only be enforced by an action and the judgment of a court competent to decide the question, and until such adjudication is had, especially in the present case, the defendant may redeem the land and thus discharge the reversioner's claim to a forfeiture. This is a cardinal principle in equity, and one of its chief heads where to save a forfeiture of the estate it will remunerate in damages.

If we should decide for the plaintiff, in the case before us, we should establish the principle that after a lien was discharged, and every cloud upon the reversion removed, the tenant might nevertheless be ousted from his estate for an omission of duty, which had already been satisfied by full and adequate remuneration.

On the whole case, we are satisfied the plaintiff can not now forfeit the life estate of the defendant. They now hold a perfect title as reversioners, freed from all liens for taxes, and unabridged by any act of the defendant.

Nor can we admit that the plaintiffs can recover damages by way of counsel fees. We have no power to order any such allowance.

Judgment affirmed

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CHARLES T. DUMONT v. STEAMER PETREL No. 2.

## THE MARINE RAILWAY AND DRY DOCK COMPANY v. THE SAME.

Maritime liens sought to be enforced by proceedings *in rem* are exclusively within the jurisdiction of the Federal courts.

Contracts for supplies and repairs made at the home port of the vessel are not maritime liens; and proceedings *in rem* against such vessel, under the watercraft laws of a State, are not based on any maritime contract, but are purely statutory, and therefore cognizable in the State courts.

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These were suits for amounts due for building, repairing, furnishing, equipping, etc., the steamer Petrel No. 2, at Cincinnati, Ohio, the home port of said boat, she being then wholly owned by parties residing in Ohio. The suits were brought to enforce an alleged lien under the watercraft law of this State against the boat by name, and she was accordingly seized. Motions were made by defendants to dismiss the proceedings for want of jurisdiction, and reserved to General Term.

*Lincoln, Smith & Warnock*, for the motion:

1. Domestic lien is admiralty lien. *Steamboat General Buell v. Long*, 18 O. St. 527.

2. This was a maritime contract. *In re Belfast*, 7 Wall. 637; *The Moses Taylor*, 4 Wall. 411; *In re Josephine*, 39 N. Y. 19; *Stuart v. Steamboat Ohio*, 10 Ohio St. 582; *Bissler v. Steamboat Messenger*, 13 O. St. 1.

*King, Thompson & Avery*, and *Huston & Shunk*, contra:

1. Action framed under watercraft law. *Paron v. Bedford*, 3 Peters, 433.

2. Maritime jurisdiction under watercraft law wholly statutory. *Williams v. Hogan*, 46 Ill. 517; *Pratt v. Read*, 19 How. 359; *Wyatt v. Stuckly*, 29 Ind. 279.

3. *In re Belfast*, above cited, was overruled by Supreme Court

HAGANS, J. It is now the well-settled law, which our Supreme Court discusses and recognizes in the *Steamboat General Buell v. Long*, 18 Ohio St. 533, that in all cases where the suit is brought for the enforcement of a maritime lien, by proceedings *in rem*, the admiralty jurisdiction of the Federal court is exclusive. So that, in the cases at bar, the only question to be considered is, whether the claims are such as belong to the admiralty cognizance. If they are maritime liens they can not be enforced in the State courts by proceedings *in rem* under the watercraft law. Statutes similar to our watercraft law have

been passed in many or perhaps most of the States; and the Supreme Court of the United States has held them to be unconstitutional and void, so far as they authorize proceedings *in rem* against vessels for causes of action, cognizable alone in admiralty. It is admitted that there is no maritime lien in the cases at bar, because the materials, labor, and supplies were furnished to the boat at her home port. And our Supreme Court, in the case already cited, hold, upon abundant authority, that contracts for building vessels, materials and supplies furnished, at the home port, are not cases of admiralty cognizance by proceedings *in rem*. *General Buell v. Long*, 18 Ohio St. 527.

This statement would seem to be decisive of the cases at bar. But our attention is called to the following consideration:

That the claims sued on are maritime contracts, upon which suits can be maintained in the Federal courts by proceedings *in personam*; that the proceedings under our watercraft law in the cases at bar are analogous to the proceedings *in rem* in admiralty, and in the nature and with all the incidents of a suit in admiralty, and therefore it is a suit in admiralty of which the Federal courts have exclusive jurisdiction; and that these are not common law proceedings, and therefore not within the exception of the Federal judiciary act of 1789.

To these arguments we have given careful consideration.

It seems to us that in Ohio, taking all the decisions of our Supreme Court, we can not question the jurisdiction of the State courts in every case provided for under the watercraft law, except as limited by the decision in 18 Ohio St. already quoted. The Supreme Court there say, p. 532:

"1. In all cases where a maritime lien arises, the original jurisdiction to enforce it by proceedings *in rem* is exclusive in the district courts of the United States, as provided by the ninth section of the judiciary act of 1789."

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But here are liens not maritime, created by the statute, which the Federal courts can not either recognize or enforce.

*Jackson v. Steam Propeller Kennie*, a case decided by Judge Field in the United States District Court, N. J., and reported in the August number, 1869, of the Am. Law Reg. 470. The liens in the cases at bar have no existence by virtue of the contract made, but by the statute only, and for the creation of which it is competent for the legislature to provide, as well as for the mode of their enforcement. These statutes simply furnish remedies of which the party may avail himself if he chooses. *The General Smith*, 4 Wheat. 438; *The St. Lawrence*, 1 Black. 429; *Ferry Co. v. Beers*, 20 How. 402; *Peyrense v. Howard*, 7 Peters, 324; *The New Orleans v. Phœbus*, 11 Id. 175; *The St. Iago de Cuba*, 9 Wheat. 409; *Wyatt v. Stuckley*, 29 Ind. 279; *Williams v. Hogan*, 46 Ill. 517.

The only cases which we have found that conflict with these views are in New York—one in the Court of Appeals, *In re Josephine*, 39 N. Y. 19, upon the authority of which *Ferran v. Horsford*, 54 Barb. 200, was decided, in which it is held that in cases where the contract sued on is a maritime contract, and the remedy is *in personam* merely, the admiralty jurisdiction is exclusive. But we are not impressed with the soundness of the judgment in those cases, and are not disposed to follow them, especially in view of the line of decisions in Ohio.

The motions will be refused, and the causes remanded for further proceedings.

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MAX. HELLMAN v. JULIUS REIS.

The Federal statutory prohibition of the admission of certain writings in evidence, unless stamped, applies only when such instruments are the predicates of an action, and does not affect their competency when introduced to establish merely a collateral fact



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A., one of two copartners, without the authority of B., his partner, formed, in the firm name, another copartnership with C., without the authority or knowledge of B. *Held*, that A. exceeded his authority as partner, and was legally liable to B. for loss resulting from such unauthorized act.

GENERAL TERM.—Reserved from Special Term on the defendant's motion for a new trial. The facts appear sufficiently in the opinion of the court.

*Wolf*, for plaintiff.

*J. & V. Abraham*, for defendant.

STORER, J. The plaintiff below claimed in his petition that he had formed a verbal copartnership, in 1863, with the defendant and his brother, the object of which was the purchase of cotton in the South during the late rebellion. The plaintiff was to advance \$10,000, and the defendant and his brother \$5,000. In pursuance of this agreement, the plaintiff furnished \$6,000 in cash, and a letter of credit for a larger sum, with which the defendant went to Memphis, Tennessee, but did not there purchase, nor has he ever purchased any cotton, nor has he returned the amount advanced to him by the plaintiff, but alleges as his excuse that, while at Memphis, he employed one A. Hirsch to aid him in the purchase of cotton, to whom he paid the money advanced by the plaintiff, but that Hirsch had not repaid the same, alleging that he was robbed of the amount. Wherefore, the plaintiff asks judgment.

The defendant answers, and admits the contract he made with the plaintiff, and the receipt of the money alleged to have been paid to him, but claims that upon his arrival at Memphis, finding it difficult to purchase cotton there, he employed Hirsch to go upon the plantations in the neighborhood to make purchases, giving him all the money advanced by plaintiff, together with nearly the same amount of the defendant's own; that Hirsch never returned to Memphis, nor did he ever return the money he had

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received, alleging that he had been robbed of the whole amount. It was further claimed by the defendant that he made inquiry as to the integrity and fitness of Hirsch before he employed him and intrusted him with the money in question; that on the defendant's return to Cincinnati, he disclosed to the plaintiff all the facts, paid him the residue of the funds, and finally settled with him, with the understanding that each was to bear his part of the loss; and, as the plaintiff had advanced \$1,000 more than the defendant in the adventure, he, the defendant, to make the burden equal, paid to the plaintiff \$1,000, and alleges that this closed the whole business between them.

There is a general denial by replication of the facts stated in the answer.

On the trial at Special Term, it was proved that on the return of the defendant from Memphis, on being asked if he had taken any receipt from Hirsch for the money paid to him, he gave to the plaintiff a paper, of which the following is a copy:

“MEMPHIS, *November 7, 1863.*

“This is to certify that we, the undersigned, have this day made the following agreement:

“Aaron Hirsch of the first part, and Hellman & Ries Bros. of the second part. Both parties have this day contracted as copartners to purchase cotton, for which purpose Hellman & Reis Bros. have to invest ten thousand dollars, and Aaron Hirsch five thousand dollars, the profits of the business to be divided in four equal parts, to-wit: to Aaron Hirsch, M. Hellman, Julius Reis, and Samuel Reis.

[Signed,]

“HELLMAN & REIS BROS.,  
A. HIRSCH.”

This agreement was unknown to Hellman until handed to him by the defendant, who, it was admitted, had no power to form a new copartnership, in which Hellman should be a member, without his consent.

This paper was objected to when offered in evidence,

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because it did not appear to have been stamped. The judge, however, overruled the objection, and admitted the evidence.

It was also in proof that Hirsch, a few years before he met the defendant, had become insolvent, paying off his debt at twenty-five cents on the dollar, and at the time he is said to have received money from the defendant was a stranger to him, and was indebted to the plaintiff \$1,200.

The defendant himself testified that he had come to the conclusion that Hirsch had not been robbed, but had appropriated the money paid to him to his own use.

The plaintiff denied that any final settlement had been made, but said that he had always intended to hold the defendant liable.

No exception was taken to the charge of the judge; and the jury, upon the whole testimony adduced, which is fully set forth in the bill of exceptions, when the case was submitted to them, rendered a verdict for \$5,000 in the plaintiff's favor.

Two questions have been argued to us by the defendants' counsel, the decision of either of which in his favor, it is claimed, must prevent a recovery by the plaintiff.

The first is: Did the judge err in permitting the introduction of the paper, purporting to be the contract made by the defendant with Hirsch.

It is said this paper should have been stamped before it was of any legal validity, and could not have been offered in evidence under any circumstances.

We suppose the object of the laws requiring stamps to be affixed to written instruments was to increase the national revenue, and to prohibit every legal method of enforcing contracts when the parties to be benefited have been derelict in their duty. In other words, no such instrument should furnish a ground of action for the intervention of the courts; but when the paper is incidental only, and is offered to establish a fact not as the predicate

of a recovery, it may be admitted as proof of the fact itself. In the case before us, neither party to the agreement sought to set it up as a valid instrument; the purpose of offering it was merely to show what was done by the defendant, and not to create a liability upon any one. The defendant in answer to the plaintiff's inquiry, as to what evidence existed of the payment to Hirsch, instead of presenting a rescript or any other equivalent, handed him the instrument which set forth the arrangement he had made with Hirsch, which was the only evidence of that fact, and without which the anomaly would have been presented of one partner placing in the hands of a comparative stranger a large sum of money without any written evidence of its receipt.

We can not so regard our stamp acts. The object of their passage was to prevent fraud on the revenue by the denying all legal remedies to them who violate those statutes. They could not apply to these cases where the instrument was introduced as collateral only, and not relied on directly;\* more especially when the party who objects to its introduction had delivered it to his partner to justify his own act. Such an assumption would lead to this result: A partner could disregard whatever the law required to validate an instrument like that which was offered in evidence, and on a trial, by objecting to its introduction, discharge his liability.

We do not find any error in this ruling of the court below.

Upon the evidence stated in the record, it is very clear the defendant exceeded his authority as a partner in the arrangement he made with Hirsch. He could not without the consent of the plaintiff have made such an agreement, and he can not excuse himself on the ground that it was a mere employment of Hirsch as an agent to purchase. The language of the agreement in writing is so explicit that no such implication can be permitted. He had no right then to put at risk the plaintiff's capital in

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\*See *Mattheson v. Ross*, 2 House of Lords' Cases, 286.—Eds.

a mode not contemplated by the original agreement of the parties, nor to apportion the profits of the adventure in a manner different from that originally agreed upon. The purpose the parties had in view when the arrangement was first made in Cincinnati was entirely changed; new relations were formed without the knowledge of the plaintiff; his money was put in jeopardy in a manner he had not and probably would not have assented to. In this view of the case the defendant assumed a responsibility not warranted by the relations subsisting between him and the plaintiff; a responsibility not anticipated, and which, if assumed, must, as between the parties, give the plaintiff the legal right to hold the defendant liable for what the plaintiff has lost by his imprudence.

Good faith is the basis of all copartnerships. The members are agents for each other, and restricted to the performance of what belongs to the general object and scope of their compact. No partner can exceed the power delegated to him. If by the unauthorized, imprudent conduct of one member of a copartnership the others suffer, he must make good the loss. If one partner borrows money on the credit of the firm, and appropriates the money to his private use, the partners are liable, but they certainly have a clear remedy against the delinquent member for indemnity.

This rule pervades the whole law, and unless it is judicially asserted there is no security in commercial relations. "Every known deviation from, and every excess in the exercise of such rights, powers, authorities, and acts which produce any loss or injury to the partnership, are, to that extent, to be borne by the partner who causes or occasions the loss or injury; and he is bound to indemnify the other parties therefor." Story on Partnerships, sec. 173.

The defendant can not be said to have employed Hirsch as an agent to purchase cotton. Such a relation might well have existed if the person employed was honest, capable, and acquainted with the business in which he

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was to engage; but, on the contrary, the plaintiff's capital was invested in a new adventure, without his privity or his knowledge, and we may well believe he would not have sanctioned the arrangement if he had been present when it was made.

We are led to the conclusion that the conduct of the defendant imposed upon him all the risks of the investment of the money advanced to Hirsch, and he thereby became liable legally to the plaintiff to the extent of the same in controversy.

How far the subsequent acts of the plaintiff, as disclosed in the record, furnish a defense on the ground of acquiescence, was a question of evidence for the consideration of the jury. The law was properly stated in the charge of the judge, and the matters adduced were to be believed or disbelieved as the jury should determine. They might well have found that there was no consideration moving from the defendant to the plaintiff for the alleged release of his claim, and therefore no legal obligation to do so existed. They might also have been satisfied that the plaintiff's silence, and his delay to assert his right, was explicable upon the peculiar circumstances in which he was placed, as was held upon a like application of the rule of evidence in *Smith v. Loring*, 2 Ohio, 440.

Having carefully considered the facts as we find them in the record, we are of opinion that there is no ground to set aside the verdict and award a new trial to the defendant.

The motion is, therefore, overruled, and judgment is ordered to be entered on the verdict.

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G. C. PETSCH v. A. L. MOWRY.

Mowry, the lessor, who alleged that his tenant was holding over, under a parol lease from month to month, brought an action of unlawful detainer

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before a justice of the peace, against Petsch, the tenant, to recover the possession of certain premises. Petsch claimed to hold under a parol lease for three years; and upon the hearing, Mowry obtained judgment of restitution. During the trial no exceptions were taken by Petsch, and he took no appeal. When the writ of restitution was about to be executed, Petsch, upon petition to this court, obtained an injunction to prevent its execution, upon the ground that according to section 10, Justices' Act (1 S. & C. 772), the justice had no jurisdiction to declare a forfeiture of his lease. Mowry answered the petition, denying its allegations, and alleged the tenancy from month to month, the holding over, and the insolvency of Petsch, and set up the judgment in detainer.

*Held*, 1. That whether or not there was such a tenancy as the plaintiff in detainer claimed, and the party was holding over his term, were questions of fact for the determination of the justice, and this court, not being a court of error or appeal in detainer, is bound by it.

2. That the action of unlawful detainer is a possessory action merely; and that sections 10 and 126 of the Justices' Act must be so construed as to harmonize the act and support the jurisdiction of justices in the action.

3. That in actions of unlawful detainer, the nature of the plaintiff's title, whether in fee simple or for years, is immaterial. Proof of his possession, at the time of creating the tenancy and delivery thereof to the defendant, is sufficient to support the action, and the defendant can not, by the introduction of proof of title, defeat it.

4. Title, in the legal construction of section 10, Justices' Act, does not mean title by mere possession which only the plaintiff need prove.

5. The tenant having other remedies under the act relating to actions in detainer (1 S. & C. 791), *quære*, whether this court can interfere in such a case as this, where he has not chosen to avail himself of them?

The facts of the case are set forth in the opinion.

*Sayler & Sayler*, for plaintiff.

*J. F. Baldwin*, for defendant.

HAGANS, J. The question in this cause is, whether a justice of the peace had jurisdiction *to try* an action for unlawful detainer, upon the following facts: Mowry claimed to have verbally leased to Petsch certain premises on Third street, between Main and Walnut streets, from month to month, at a rent agreed upon between them, and that Petsch entered into possession accordingly; but Petsch being in arrears for rent, February 1, 1867, Mowry shortly afterward began proceedings for unlawful deten-

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tion before C. F. Hanselman, J. P., to obtain possession of the premises, on the ground that his tenant was holding over. On the trial of the cause before the justice, Petsch claimed that although he had not paid his rent, he was not holding over; because he had a verbal lease from Mowry for three years, which had not expired. There was considerable testimony on this subject; and the justice finally held that Petsch was a tenant from month to month, holding over his term, and rendered judgment of restitution. No exceptions seem to have been taken at the trial, as provided in section 136, Justices' Act (1 S. & C. 794). Mowry sued out an execution, and, when it was about to be executed, Petsch filed his petition in this case, claiming that he was holding the premises under a verbal lease for three years; setting forth the judgment in detainer against him, and alleging that the magistrate had no jurisdiction to declare a forfeiture of his lease, or to render judgment in restitution, or to issue execution thereon; and that irreparable injury would ensue to him if the writ was executed, and prayed an injunction, which was allowed. The defendant, Mowry, answered, denying all the allegations of the petition, alleging a monthly tenancy, default in payment of rent, and setting up the judgment in detainer, and that Petsch was insolvent and still in possession of the premises.

The controversy has been pending for a long time, with varying fortune, and has, in one shape and another, been before all the judges of this court. Trial was finally had, judgment rendered for defendant, a bill of exceptions taken, embodying all the testimony, and the cause is now here on error.

If the justice had jurisdiction to hear and determine the proceeding in unlawful detainer, then the judgment of the court below was right, and the injunction ought not to have been allowed; otherwise, not, unless there is something else that authorized the interference of the court. Nothing else appears as the case now presents



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itself, but the bare question of the jurisdiction of the justice.

It will be observed that Petsch did not avail himself of any of the provisions pointed out by the statute relating to detainer as the predicate of a proceeding in error. If he had done so, another tribunal would have had the supervision in a proper case, for the correction of errors. *Kelly v. Nichols*, 10 Ohio St. 326.

But failing to do so, we can not help him by reviewing as in error.

Section 126 of the Justices' Act defines the cases in which the action for detainer will lie. The first sentence reads as follows: "Proceedings under this article may be had in all cases against tenants holding over their terms." The bill of exceptions contains the record of the proceedings before the justice, and the complaint shows that the proceeding was instituted because Petsch "was unlawfully holding over his term," and the proceeding also shows every step in it to have been regular, such as service of process, trial, judgment, etc. Now, if this were all there is in this cause, that judgment, unless reversed by the court having jurisdiction in error, in a proceeding for that direct purpose, binds the parties. *Moore v. Robinson*, 6 Ohio St. 305.

But it is said that the preponderance of evidence before the justice, plainly showed that Petsch had a lease for three years, and that the justice, therefore, had no jurisdiction. If this were so, how can we sit as a court of errors to correct an alleged erroneous conclusion of the justice upon the disputed facts? The jurisdiction of the court does not depend on the merits of the case, and if there were the power to hear, ascertain, and determine the rights of the parties—which is jurisdiction—the judgment, however erroneous, is not void, but only subject to correction in a proper proceeding.

Again, by referring to section 127 of the same act, it will be perceived that either party, notwithstanding the

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judgment of the justice or of the court of error, might bring an after action, if there be any sufficient ground for it. He might bring trespass or ejectment, or indeed another action of unlawful detainer in a proper case possibly; and the section we have quoted says the former judgment shall be no bar to it. If this be so, the interference of a court of equity in such a case as this is questionable, as the party may have abundant remedy in other forms of action.

But is the defense made by Petsch, that he had a lease for three years—that is to say, a better or paramount title to that of the landlord—to be allowed?

In *The People v. Nelson*, 13 N. Y. 343, the Judge (Spencer) says, “that the right and title of the defendant can not be gone into.” 11 Johns. 509, also.

If, therefore, Petsch considered his claim to be paramount to that of Mowry, he must resort to some other remedy to maintain his claim. *Dutton v. Tracy*, 4 Conn. 80.

It may be said, however, that behind all this discussion, there remains a decisive evidence that the justice had no jurisdiction in this; that the title to real estate was drawn in question; and that in that case, except in trespass, the justice has no jurisdiction. Compare sections 3 and 10, Justices’ Act (1 S. & C., pp. 770 and 772).

The action for detainer is a possessory action merely. In general, the title of the plaintiff is not to be investigated. The nature of his estate, whether fee simple or for years, is immaterial. His possession at the time of making tenancy and the delivery of that possession to the defendant is sufficient; and the defendant can not, by the introduction of proof of title, take away the jurisdiction, for that would put it in his power to defeat the action. *Nichols v. Patterson*, 4 Ohio, 200; *Bridgman v. Wells*, 13 Ohio, 46. In this last case, the court says, speaking of the jurisdiction of a justice, “The rule is this, as we understand it, where the plaintiff, in order to sustain his case, is compelled, in the first instance, to prove certain facts, or to disprove

them, and those facts, or either of them, are title to lands or tenements, the jurisdiction is excluded, except in trespass; but where it is unnecessary for the plaintiff to introduce such proof, the defendant can not, by its introduction, take away the jurisdiction."

In 4 Ohio, 200, the court says: "It can hardly be denied that possession is one species of title, and this must either be established on the trial, or the plaintiff will be nonsuited. In this action"—which was for a nuisance on real estate before a justice, where this objection was made—"a mere naked possession, a title of the lowest and most imperfect degree, but nevertheless a title, is necessary to enable a plaintiff to support it. The word title must be taken in its legal technical sense; and if so, a naked possession must be admitted to be within the statute." But that cause went off, on the ground that the statute expressly excepted actions for nuisances from the jurisdiction of a justice; so that the language of the court is mere *obiter dicta*. "Certainly, a matter so important," says the judge in the same case, "as the jurisdiction of a court, ought to have, if possible, some rule of general application."

We see no reason why it is not possible to avoid so strict a construction, when it would deprive justices of jurisdiction in so large and important a class of cases as that of the various actions of detainer. For so strict a construction, as that suggested by the Supreme Court, would, at a single blow, strike the whole act relating to detainer from the code. We can not think this to have been the intention of the legislature. The same act providing for and limiting the jurisdiction of a justice, also provides for the proceedings in detainer, and in comparing the sections together we feel justified in the conclusion which we have reached, and which harmonizes the whole act and evidently expresses the legislative intent, viz: that in detainer justices have jurisdiction to hear and determine the mere possessory right of the parties. Title, in the legal

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construction of the Justices' Act, does not mean title by mere possession, which only the plaintiff need to prove. See *Aubrey v. Almy*, 4 Ohio St. 524.

The very moment, therefore, Petsch's term ended, as the justice found, Mowry had his right of action for detainer against the defendant for holding over; the magistrate had jurisdiction to hear and determine it and to render judgment, notwithstanding the defendant claimed a lease for three years. And that judgment is final, so far as this court is concerned, and the injunction was not properly issued.

We have been cited, in argument, to a number of cases relating to forfeiture, which, in the views we have expressed, have no application. The justice did not forfeit the alleged lease, but rendered judgment in detainer for holding over.

Judgment affirmed.

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HENRY LEONARD v. WM. A. O'HARA.

A judgment in a suit by a contractor for a paving assessment against one of the owners of property fronting on the street, is not conclusive as to the rate of compensation in another action brought by the same plaintiff against other owners.

Reserved from Special Term.

This is a suit to recover an assessment for grading and paving Seventh street with Nicholson pavement, asking a judgment for \$212.30, and that it might be declared a lien on the defendant's land. The answer, filed October 9, 1868, stated eight defenses, the sixth being as follows: "That the city council knew that the commissioner's certificate was false, and that the work was not done, and passed the ordinance to relieve the city from liability to the plaintiff, and the plaintiff from the duty of completing his job according to contract."

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After the demurrer to all the defenses except the fourth, fifth, and sixth, to which the plaintiff replied by denials, had been argued and passed upon, the defendant, by way of amendment, without withdrawing any of his defenses, adds a ninth ground of defense: "That at the October term, 1869, of the Hamilton Common Pleas, in a suit brought by the plaintiff against Theodore Marsh for an assessment under the same ordinances and contract, seeking to charge Marsh as an owner of a lot on Seventh street, between Freeman and Cutter streets, for his share of the cost of the same improvement according to his front feet, viz: at the rate of \$8.49,  $\frac{1}{1000}$  per front foot, with interest and penalty, just as is claimed in the present case, and not otherwise, and that the petition, in that case, was exactly like the petition in this case, except that it described Marsh's premises instead of the defendant's; and that Marsh pleaded the same defense as is pleaded in the sixth defense in this case, to-wit:

"That although said work was not done in a good and workmanlike manner, nor in accordance with the terms of said contract, and although said Lawrence, city commissioner, did certify falsely, as is alleged in his petition, and although said city council did pass said assessing ordinance, yet, that at the time of such passage, said city council well knew that said certificate was false and said work not done according to said contract, nor in a good and workmanlike manner, and adopted said ordinance with the purpose and for the end of relieving said city from liability to said plaintiff for said work as actually done, and said plaintiff from the duty of completing the same according to said contract.'

"And that the plaintiff replied in the same words and figures as in this case, and the issue having thus been joined, the cause was submitted to trial by jury under the instructions of the court, and said jury returned their verdict, finding the issue for the plaintiff, and assessing his damages, not at the rate claimed in the petition, but at

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the smaller sum of seven dollars per foot front of the said lot so by said Marsh owned and abutting and bounding on said street, together with interest, but without penalty, and the court rendered judgment upon the verdict in favor of the plaintiff in said sum, which judgment is in full force, and thereupon the defendant claims that to the extent of \$1.49 $\frac{1}{10}\%$  the judgment aforesaid is an estoppel, and conclusive bar against the prosecution of this suit by the plaintiff."

To this additional ninth ground of defense the plaintiff demurred, and the questions arising upon that demurrer were reserved for decision in General Term.

*M. D. Hanover*, for plaintiff.

*E. A. Ferguson*, and *Hoadly, Jackson & Johnson*, for defendant.

TAFT, J. Whether the issue decided by the jury and common pleas court, in the case of *Leonard v. Marsh*, was identical with that made in the sixth defense would be a matter of evidence, if denied. But upon this demurrer we must regard the statement in the ninth defense as true; and the question to be now determined is whether, being true, the defense is valid, *i. e.*, whether the fact that the plaintiff has brought suit against one of the owners of property fronting on the street improved, claiming \$8.39 $\frac{1}{10}\%$ , and the defendant having set up a defense that the job was not well done, the rate per foot was fixed by the jury at \$7 per foot, and ratified by the court, establishes that rate for all the owners as between them and the plaintiff, the contractor. It is claimed that the question has been tried by the plaintiff himself and decided against him, and that he is bound by the judgment as *res adjudicata*.

By section 30 of the Municipal Corporation Act, it is provided "that proceedings at law or in equity may be

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instituted against all the owners or each, or any number of them, or to enforce the lien against all the lots or land, or each lot or parcel, or any number of them, embraced in any one assessment; but the judgment or decree shall be rendered severally or separately, for the amount properly chargeable, and any proceeding may be severed in the discretion of the court, for the purpose of trial, review, or appeal."

Although the contract of the plaintiff with the city was one, yet the liabilities of the different owners were and are several. Nor can one be said to be in privity with another. Each owner is liable for his own property and for that only. Nor has he any power to defend in a suit against another. It is true that the city or the contractor to whom the assessment has been assigned, could, by express provision of the statute, join all the owners in one suit, if he had chosen to do so. But his judgments must be several. Nor could the defendant have filed a petition in error against the plaintiff in the common pleas suit. Ought he, then, to be bound by the decision of the jury? It seems to us not. "Both the litigants must be alike concluded, or the proceedings can not be set up as conclusive upon either." 1 Greenleaf's Ev., sec. 524.

If, then, the defendant was not bound by the result of the suit against Marsh, to which he was not a party, can he claim that the plaintiff shall be conclusively bound. The plaintiff was a party, but a judgment to be conclusive on either must be conclusive on both.

Here is a case where the binding obligation of the judgment seems not to be mutual. It is not binding on the defendant, because he has been a party to no proceeding which has determined the fact which is claimed to have been established. We are not prepared to hold that O'Hara was estopped by the judgment against Marsh, to make a defense and claim a greater abatement than the jury in that case made.

The question recurs, whether the fact that this rate

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having been established in a suit to which the plaintiff was a party, and in which *he* had every opportunity to assert and prove a higher rate, he shall be permitted to have another chance to litigate the same question. It has been said that it would not be safe to allow such a judgment to be conclusive against the plaintiff even, who was a party, because the judgment may have been obtained by the testimony of the defendant himself, who was not a party to that proceeding, but who seeks to use it as conclusive.

The force of that consideration is very much diminished by the fact that the parties themselves are now allowed to testify. Nevertheless, we find no authority for holding a judgment conclusive on one party which is not conclusive also on the other.

The passage in Adams' Equity has been cited, which relates to bills of peace, page 440. This passage states the mode of procedure, where there is a common right or liability in a class of persons, as where a parson claims tithes, or the owner of an ancient mill claims service to his mill from the tenants of a particular district. At common law the remedy would be against each separately. But in equity they may all be joined in one suit; and an adequate number may be joined, as representatives of a larger number, where the class is numerous.

But the suit against Marsh was not of that representative character, and does not appear to have been intended as a mode of settling any general rule for the other owners. If it had been so intended, others would have been joined in the same suit. Especially would this be so, inasmuch as the statute expressly provides for uniting them all in one suit. A bill of peace brings in by personal service or by representation all the parties who are to be bound by the decree.

If all the owners had been made parties to the former suit, they would have all been bound by the rule established for all. But as the defendant was not a party he



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can not claim that the rule of the case against Marsh shall conclude, as a *res adjudicata*, the plaintiff, because he is not himself concluded.

We hold, therefore, that the demurrer to the ninth ground of defense must be sustained.

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THE LITTLE MIAMI, COLUMBUS AND XENIA R. R. Co., Plaintiff  
in Error, v. J. A. DODDS & Co., Defendants in Error.

A common carrier having given a bill of lading for goods, can not relieve himself from liability on the ground that the goods were never received by him, except by the clearest proof of that fact.

The facts appear in the opinion.

*D. T. Wright*, for plaintiff in error.

*Coffin & Mitchell*, contra.

Error to refusal of the court below to grant motion for a new trial made by defendant.

STORER, J. The action was brought to recover of the defendants the value of two hogsheads of tobacco, received by the agent of the defendants at Louisville, Ky., to be transported from that city to Boston, Mass.

A bill of lading, acknowledging the receipt of the property, was signed by the agent of the defendants and delivered to the plaintiff's agent, in which the plaintiffs were named as the consignees at Boston. On the trial, before a jury, at Special Term, the only question really discussed was, whether the tobacco had ever been delivered to the carriers.

To prove the affirmative the plaintiffs produced the bill of lading, and one of them testified they had never received the property from the carriers. On the other hand, the agent who signed the contract being dead, several witnes-

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ses were examined, by whom it was claimed the fact relied upon by the defendants was established.

It appeared in the evidence that Emlen, the agent of the plaintiffs, had been for several years the purchaser, on their account; of large quantities of tobacco, which, during the months of July, August, and September, 1864, had been carried by the defendants, without loss, except as to the two hogsheads in controversy. Emlen had bought the tobacco at auction, at the Boone Tobacco warehouse in Louisville, where it was then stored. By the custom of the trade, the owners of the warehouse issue to the purchasers a certificate for each package, and on 3d day of August, 1864, gave to Emlen two certificates, one for a hogshead marked No. 19,228, weighing gross 2,210, net 2,030, for which they had been paid \$732.30, and another certificate for a hogshead No. 21,080, weighing gross 1,710, net 1,570, for which \$484.27 had been paid; which certificate obligates the warehouseman to deliver the property to the vendee. These certificates are called "tobacco notes." They were delivered to the defendant's agent by Emlen, to obtain the tobacco for shipment; and in return the bill of lading was given, upon which the plaintiffs seek to recover. The tobacco notes were given up to the warehouseman by the defendant's agent and canceled.

To explain the testimony thus offered, the deposition of the agent of a transfer company, whose business it was to carry freight from warehouses to steamboats and railroad depots, was read. He stated that the tobacco was never received by that company, but no witness connected with the defendant's agency corroborated the transfer agent.

The whole question was left to the jury, who found a verdict for the plaintiff.

We are asked to set this verdict aside. First, because it was against the evidence. Second, because it was against the law.

An examination of the testimony convinces us that we

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should have decided the case for the plaintiffs if it had been heard on submission.

It would be a dangerous rule to adopt, to permit a contract like this to be discharged except upon the clearest evidence. We find no mistake was proved, no fraud pretended, but the mere fact of the non-delivery to the consignee at Boston, when all the other packages arrived safely, may, it is urged, give rise to the presumption that the defendant never received the missing hogsheads. Mere presumption of non-delivery to the carrier after he has once admitted the fact of its receipt, can not and ought not outweigh his formal written admission.

The questions of law presented by the record do not, we are satisfied, affect the decision of the case. The judge charged as favorably for the defendant as the facts proved would permit him, nor can the objections taken to the admission of testimony be sustained.

In the leading case of *Lickbarrow v. Mason*, 2 Term, 75, Buller, J., said: "A bill of lading is an acknowledgment by the captain of having received the goods on board his ship; therefore, it would be a fraud in him to sign such an instrument if he had not received the goods," and this was the established doctrine for many years afterward, though it is now the admitted law that the carrier may explain his contract by proof of all the attendant circumstances. 1 Parsons' Mar. Law, 137, and cases cited.

When we consider that a bill of lading, if indorsed by the consignee, passes his title to the property, and even if delivered without indorsement to a third party, creates an equitable lien in his favor, who has received it for value, which courts will protect, it becomes our duty in every proper case to enforce the carrier's liability upon his contract.

If we apply the rule we have indicated to the case before us, we are satisfied, both on the law and the evidence, that the motion for a new trial should be overruled and judgment entered on the verdict.

Motion overruled.

Beresford v. McCune.

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## RICHARD BERESFORD v. JOHN McCUNE.

The purchaser of a horse warranted to be sound and safe, upon a breach of the warranty, need not rescind the contract by re-delivering the horse, and sue for the amount paid, but may retain the horse and sue for damages, in which case the rule of damages will be the difference between the actual value of the horse at the time of sale and what he would have been worth "if he had been sound and safe according to the warranty."

Reserved from Special Term.

This is an action for breach of a warranty in the sale of a horse. The facts found by the judge at Special Term, and which accompany the certificate of reservation, are as follows:

"*First.* That on the 2d March, 1869, the defendant sold and delivered to the plaintiff, at his stable in Cincinnati, a horse for \$400, and warranted him to be sound and safe property.

"*Second.* That in about a week after said sale and delivery said horse became lame, whereupon the plaintiff tendered him back to said Davis & Smith, at their stable, the defendant being absent from the city; and afterward, about the 29th March, 1869, the plaintiff tendered the said horse to the defendant and requested him to return the price paid for him, but the defendant refused to receive him or pay back the purchase money, whereupon the plaintiff brought this action.

"*Third.* That the said horse was not sound at the time of the said sale and delivery.

"*Fourth.* That after said tender the plaintiff retained, and at the time of the trial had said horse, and has, from the time of the sale and delivery to him, kept and used said horse, as he had occasion, for the purpose for which he purchased him, except at intervals when the horse has been unfit for use by reason of lameness.

"And the court not being fully advised whether, upon

the facts found as aforesaid, the plaintiff is entitled to recover the price paid for said horse, or what, if any, damages he is entitled to, reserved said question for the decision of the General Term.

“And the defendant files his motion for a new trial, which motion, it is ordered, be continued for hearing until after the decision of the General Term aforesaid.”

The petition states the sale with warranty of soundness, by the defendant to the plaintiff, March 2, 1869, for \$400, which plaintiff paid for the horse. It alleges that the horse was unsound and useless to plaintiff, and has caused the plaintiff \$50 loss in keeping him, and claims to have sustained damages to the amount of \$400, and asks judgment for that sum, all of which the defendant denies in his answer.

*L. D. Champlin*, for plaintiff.

*E. A. Ferguson*, for defendant.

Taft, J. It is claimed by the defendant that there can be no recovery, because the plaintiff has not delivered back the horse to the defendant.

If the plaintiff sought to recover the price paid for the horse upon the rescission of the contract, he would have first to give up the horse. But this petition does not allege a rescission of the contract, but only that the horse was unsound and that he claims \$400 damages. It is not necessary to tender back the horse, or to rescind the contract in order to recover damages for breach of the contract of sale and warranty. The recovery, however, in the case as presented in the petition, does not depend upon the price of the animal, but upon the actual damage. This may be as much as the value of the horse. The horse may be valueless. But the plaintiff is not obliged to give him up. He may keep him and recover his actual damage. That is the privilege of any purchaser of warranted property. If, however, he would make the price

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of the property his rule of recovery, he should rescind and redeliver the property purchased. In the present case, there is not a finding of facts upon which a judgment can be rendered; because the actual damage sustained by the plaintiff is not ascertained.

The case will have to be remanded, with instructions to ascertain the actual damages sustained by the plaintiff and to enter judgment therefor.

The question will be, how much less the horse was worth at the time of the sale than he would have been if sound, according to the contract.

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THOMAS A. CURRAN v. JOSEPH CHEESEMAN ET AL.

Section 30 of the act of Congress of 1852 does not expressly or impliedly relieve the proprietors of steamboats from the presumption of negligence, which, under section 13 of the act of 1838, arises from the simple fact of explosion.

The averment of a strict compliance, on the part of the proprietors of steamboats, with all the requirements of the act of 1852, without averring care and denying negligence, is not a good defense to the allegation of loss by an explosion caused by negligence.

Reserved from Special Term.

This case came to the General Term, on motions to strike out the second and third defenses, and on a demurrer to the fourth defense.

The suit was brought by a passenger on the steamboat *Magnolia*, on a trip from Cincinnati to Maysville, against the owners for damage suffered by him from an explosion of the boilers, caused, as is alleged, by negligence of the defendants and their servants.

The answer, as a first defense, denies negligence or want of skill in the navigation of the boat, and denies that the

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boilers exploded through any carelessness or unskillfulness of themselves or their servants, or through any unseaworthiness of the boat, and denies the damage alleged.

The second defense says that the defendants were carrying on commerce between the States bordering on the Ohio river, under the laws of the United States relating to the coasting trade, and under the laws relating to the better security of the lives of passengers on board vessels propelled by steam, and used the special license granted by virtue of said laws; that the boat was licensed, equipped, and manned according to the laws of the United States; that less than six months prior to the loss, the steamboat had been inspected under the act of Congress of 1852, for the better security of vessels propelled in whole or in part by steam, and a certificate given by the inspectors that she was in conformity with law, and that she might be employed as a passenger steamer without peril of life from any imperfection, and that her boilers had been tested and found safe and conformable to the requirements of the law; that no want of care or skill led to or caused the injury, but that the injury happened from causes over which they had no control; that a principal cause was the thickness of the iron of the boilers, which were made to conform to the law; that the injury did not happen from want of care or from any cause which could have been known.

The third defense alleges all the facts contained in the second, except that it is not expressly averred that the cause could not have been known by any skill, care, or foresight.

The fourth defense seems to be identical with the second and third, except the omission to aver expressly that the engineer in charge used due care in the management of the boilers and engine at the time of the disaster.

*Burnett, Follett & Wright, for plaintiff.*

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*Lincoln, Smith & Warnock, and Hoadly, Jackson & Johnson, for defendants.*

Taft, J. The argument in this case has gone upon the idea that the fourth defense did not allege care, and deny negligence as the cause of the injury, but relied upon the averment that it was caused by the thickness of the iron, and the fact that all the requirements of the act of Congress had been complied with, and that it differed from the preceding defenses in not alleging care and denying negligence.

If we have been able to comprehend these defenses accurately, there is some doubt whether the supposed difference exists in fact. But as both parties assume that it is so, we shall so consider it in this opinion.

The claim is that the legislature has provided very minutely the precautions it has deemed necessary, and that it has left no room for want of care, if the law is complied with. By section 30 of the act of 1852, which is amendatory to the act of 1838, it is provided:

"That whenever damage should be sustained by any passenger or baggage, from explosion, fire, collision, or other cause, the master and the owner of such vessel, or either of them, and the vessel, should be liable to each and every person so injured to the full amount of damage, if it happened through any neglect to comply with the provisions of law herein prescribed, or through known defects or imperfections of the steaming apparatus, or of the hull."

Section 13 of the act of 1838, 5th U. S. Statutes at Large, page 306, of which the act of 1852 is an amendment, is as follows, viz:

"That in all suits and actions against proprietors of steamboats for injuries arising to person or property by the bursting of the boiler of any steamboat, or the collapse of a flue, or other injurious escape of steam, the fact of such bursting, collapse, or injurious escape of steam, shall be taken as *prima facie* evidence, sufficient to charge the defendant or those in his employment with negligence,



until he shall show that no negligence has been committed by him or those in his employment."

This section has not been repealed, unless it is to be considered as impliedly repealed by section 30 of the act of 1852. That such is not the true interpretation is manifest from the language of the Supreme Court of the United States in the case of the *New World v. King*, 16 H. 469: "That the proper management of the boilers and machinery of a steamboat requires skill must be admitted. Indeed, by the act of Congress of August 30, 1852, great and unusual precautions are taken to exclude from this employment all persons who do not possess it. That an omission to exercise this skill vigilantly and faithfully endangers, to a frightful extent, the lives and limbs of great numbers of human beings, the awful destruction of life in our country by explosions of steam boilers but too plainly proves. We do not hesitate, therefore, to declare that negligence in the care or management of such boilers, for which skill is necessary, the probable consequence of which negligence is injury and loss of the most disastrous kind, is to be deemed culpable negligence, rendering the owners and the boat liable for damages, even in case of gratuitous carriage of a passenger. Indeed, as to explosion of boilers and flues, or other dangerous escape of steam on board steamboats, Congress has, in clear tones, excluded all such cases from the operation of a rule requiring gross negligence to be proved to lay the foundation of an action for damages to person or property."

He then refers to section 13 of the act of 1838, and proceeds: "This case falls within this section, and it is therefore incumbent on the claimant to prove that no negligence has been committed by those in their employment." Also, *Waring v. Clarke*, 5 H. 465, and *Murphy's Adm'r v. Northern Trans. Co.*, 15 O. S. 553.

We are clearly of opinion that the provisions of specific things to be done and provided by the owners of steamboats by the statute, does not imply any discharge of them

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from responsibility for care in the navigation and management of the vessel.

It has been held by our Supreme Court, and is established law, that if a carrier enter into an express contract by which the carrier is relieved of responsibility for the negligence of himself or his agents, such a contract is void as against public policy. Yet we are asked by the construction of this act to discharge or limit the owners and their agents from responsibility for carelessness, without a contract even, and without any express statute. It would be a remarkable statutory provision, which should leave it possible for the owners legally to escape responsibility for negligence in the management of steam power in the carrying of passengers by water. The danger is too great, and too well recognized by legislatures as well as people, to suppose that any such relaxation was intended, unless it should be most clearly expressed. The demurrer, therefore, to the fourth defense is sustained.

Upon examination of the second and third defenses, which we are asked to strike out, we have become satisfied that the theory of all these defenses is to present one, or at most, two defenses.

The first defense would seem to cover all the kinds of negligence, on account of which a recovery is sought. The fourth defense seems to be intended to set up a compliance with the statute as an excuse for any possible want of care which may have contributed to the loss.

Both the second and third defenses seem, as we understand them, to combine these two ideas with great particularity of statement; and they are so nearly identical that we think that the record ought not to be incumbered with more than one of them. The general purpose of the code is to have the same cause of action or the same ground of defense but once stated. But in the present case, in order to facilitate the review of the case in the United States Supreme Court, we have concluded to permit one of these two defenses to remain on the record.

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The defendant can elect which it shall be. As to the other, the motion to strike out will be granted.

The effect of this ruling is to leave the first general denial of negligence to stand, and with it a plea or defense combining an averment of a specific compliance with the act, with a denial of want of care, and also a third defense relying upon compliance with the statute without the allegation of care. This, we think, will give opportunity for the defendants to introduce all the evidence which they can be entitled to introduce in any aspect of the defenses disclosed by the answer as drawn.

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#### HENRY BOERES v. B. F. STRADER.

It is no evidence of a dedication to the public, that the owner of wharf property, in using it for his own profit, leaves it open and free for public travel. Wharf property, like other real property, is subject to assessments made thereon by the city for the construction of a sewer in a street on which the said property abuts.

Reserved from Special Term.

This is an action to recover an assessment upon the defendant's wharf property to pay the cost of a sewer which has been constructed under Ludlow street to the river.

The petition sets forth the act authorizing the city to make a plan for the sewerage of the city the plan made by the city under that act giving the location and limits of the sewers as designated; the contract for the division of the sewer in question; the performance and acceptance of the work; the ownership by the defendant of the wharf property, and the assessment by ordinance under the law.

The answer of the defendant admits the act authorizing the construction of sewers, and that he is owner of the

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wharf or landing described in the petition, except that the wharf or landing owned by him is bounded on the east by what would be the east line of Ludlow street, if extended, and is subject to the east sixty feet thereof to the life estate of Matilda B. Myers, having been assigned to her for dower, and he admits the construction of the sewer by the plaintiff under contract with the city as alleged.

The defendant further claims, that the sewer was constructed "for public uses and for the health and convenience of the inhabitants of said city of Cincinnati, and not for the defendant's uses, and was laid upon his premises without compensation and in violation of section 19 of article 1 of the constitution of this State.

In the argument it was admitted that Ludlow street extends to the river at low water, and that the sewer is laid in the street.

*Forrest & Lindemann*, for plaintiff.

*King, Thompson & Avery*, for defendant.

TART, J. It is claimed by the defendant's counsel, in the argument, that his interest in the wharf property is not such as to be properly chargeable under the law for the cost of a sewer. It is claimed that the property is a highway, with the right in the defendant to collect wharfage; that the fact that the ground has been open to the public use as a highway, has long since operated as a dedication for that purpose, and that although the defendant retains the right to collect wharfage of those who land boats upon it, he is not chargeable as the owner of land.

We do not find in the evidence a warrant for this position. We think that the defendant, and those under whom he claims, have evidently intended to use this property for their own profit. That use required that they should keep it open and graded and unobstructed. A dedication to the public is a grant, presumed from the circumstances

under which the public have been or may be permitted to use the property. We find nothing in the evidence to satisfy us that the defendant has intended to deprive himself of any available value of this ground. Whether he may be considered as having committed himself with the public to the uninclosed condition of the ground, so that he could not inclose it, or not, we regard him as the owner of the land in such a sense as to be liable to pay taxes on it, both general and special. If it belonged to the public, the grading, paving, and improvement of it would be a matter of public charge, which has not been claimed or thought of. There is a public landing which was dedicated to the city, and which is owned by the city and kept in order by the city. But the relation of the city to this landing of the defendant is very different. We regard it as his property. He has unquestionably so regarded it himself for all available profit. It is only as a *subject of taxation* that he disclaims the ownership. The only way in which he can avail himself of it as a wharf, is to throw it open to his customers and to those who do business with his customers. This shows no purpose to part with any right in the property, or in the control of it. Now the fact that he has agreed to use it in that way in which he can make it most profitable to himself, is very faint evidence that he has given it to the public. We think, then, that the land was taxable in the hands of the defendant, and that he can be assessed on account of it for purposes of improvement by the city.

It has also been claimed that this property, as owned by the defendant, did not fall within the description of "lot or lots of land," which is the description in the statute, of property subject to be assessed for sewerage purposes. But we think that this lot of land is very well defined, and answers to the description of taxable property.

It is averred in the answer, that the sewer was for the public generally, and of no local advantage to the defendant as the owner of this property, because he did not con-

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nect with it. But the sewer drains that part of the city, and is supposed to benefit peculiarly all the property through or near which it passes. It is not merely by connecting with it that the property holders derive benefit from a sewer. The owners of the lower grounds are interested in having the grounds above them properly drained, and the waters from them provided with a channel to the river, instead of spreading over the grounds below. The defendant's wharf, as the lowest of the grounds to be drained by that sewer, is interested in the drainage of all the lots of ground above him, from which water might otherwise flow over his land.

Upon full examination of the case, we are not able to find any ground on which the defendant can be excused from paying his assessment for the cost of the sewer.

The plaintiff may have a judgment for the amount of the assessment with interest.

[Leave to file a petition in error in the Supreme Court refused.—EDS.]

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#### DOWELL & BOWMAN v. STEAMBOAT MELNOTTE.

The ground on which an admiralty lien does not attach to a boat for supplies furnished in a home port, is that they are presumed to have been supplied on the personal credit of the owners. This reason applies to the residence of the owners rather than to the place of the registry. In determining the home port for the purpose of deciding whether the case makes a maritime lien, the court will be governed by the residence of the owners.

The seizure and sale by the sheriff of a boat within the jurisdiction of the United States admiralty court, on a warrant under the watercraft law of Ohio, are void, and the purchaser of the boat at the sheriff's sale is entitled to have the purchase money refunded.

This case was reserved to General Term on a motion by Good, a purchaser of the steamboat Melnotte at sheriff's sale, to have the purchase money refunded to him because

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he received no title to the boat, the sale being void for want of jurisdiction in this court which ordered the sale.

The suit of the plaintiffs, Dowell & Bowman, was commenced by a seizure of the boat under the watercraft law of Ohio, on the 2d July, 1866. Another suit was commenced on the 20th July, 1866, by Florer, under the same State watercraft law. On the same 20th July, an admiralty proceeding was commenced in the United States district court against this boat. Soon after, other suits were commenced in this court against the owners, and attachments procured and levied on the same boat; and on the 6th December, 1866, a sale was made by the sheriff, on the first proceeding under the watercraft law, to Mr. Good for \$1,450, which purchase money was paid to the sheriff, and the possession of the boat delivered to the purchaser. But afterward the boat was sold by the United States marshal on the proceeding commenced July 20, 1866, but the purchaser gave up his purchase, and the sale was abandoned, on account of the doubt entertained of the validity of the seizure under the admiralty proceeding in the United States court, because the boat was in the hands of the sheriff, under process, at the time of the seizure in the admiralty. After the sheriff's sale, however, to Good, and the delivery of possession, the marshal renewed his seizure of the boat, on the process in his hands issued on a maritime lien, and on that seizure the boat was finally sold by the marshal to Isham, who received from the marshal the possession and title, leaving Good, the purchaser under the sheriff, with neither. Good now seeks to have his money refunded.

*W. M. Ramsey*, for Good, the purchaser at the sheriff's sale.

*Huston & Shunk; Hoadly, Jackson & Johnson; Lincoln, Smith, Warnock & Stephens, and Jordan, Jordan & Williams*, for different claimants of the fund on distribution.

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Dowell & Bowman v. Steamboat Melnotte.

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Taft, J. This motion is resisted on two grounds:

1. That Cincinnati, where the goods were furnished to the Melnotte, was her home port, and that consequently, the claim did not fall within the admiralty jurisdiction, and the proceeding under the watercraft law was valid.

2. That if that were not the case, the purchaser from the sheriff was entitled to avail himself of all the right which the sheriff had to the boat by virtue of any process in his hands, and, therefore, that he did take something; that, in fact, as the sheriff held the boat on the attachments as well as under the proceedings under the watercraft law, he acquired from the sheriff the possession and the property in the boat, subject only to the admiralty liens. That he was bound to protect this title by resisting or paying off the admiralty liens, which were not enough to exhaust the value of the boat, and saving what could be saved, or to bear the loss himself.

In support of the first point, it is claimed that the registry, and not the residence of the owners, is to be regarded in determining which is the home port; and that the registry of this boat was at Cincinnati. One of the owners resided in Covington, Kentucky, and the other at Rising Sun, Indiana; but no owner resided in Cincinnati.

The ground on which the admiralty lien does not attach to a boat for supplies furnished in a home port is, that they are presumed to have been supplied as the personal credit of the owners. This reason applies evidently to the residence of the owners, rather than to the place of the registry. We must, therefore, be governed, in determining the home port for the purpose of deciding whether the case makes a maritime lien, by the residence of the owners. 1 Conkling's U. S. Adm. 80; *The St. Iago de Cuba*, 9 Wheat. 417. But it is not a question of State lines, as is stated in the opinion of Judge Thompson in the case just cited, by which it is to be understood, that a port may not be a home port, though it be in the same State where the supplies were furnished or the contract made. If the



owners are not present, or at home, in the port where the debt was contracted for the ship by the captain, the presumption is, that the creditor dealt on the faith of the ship; and the fact that the owners were at home in some other place, or port in the same State, would not rebut that presumption. Would, then, the fact that one of the owners resided in Covington, very near to the port where these supplies were furnished, rebut the presumption that they were furnished on the credit of the boat, so as to exclude the admiralty jurisdiction from enforcing the liens?

It has not been so treated by the United States court in the present case; nor can we so hold. Notwithstanding the proximity of Covington to Cincinnati, we must hold that supplies furnished in Cincinnati to a boat owned in Covington may be presumed to be supplied on the credit of the boat, in order to sustain the lien in admiralty.

It is necessary now to consider the question whether Good took any right or interest by the sale for his purchase money, Cincinnati not being the home port of the vessel, and the boat being within the jurisdiction of the admiralty.

The sale was on the warrant under the watercraft law. We think that Good could not have supported his title to the boat by reference to the attachment which was in the hands of the sheriff. If the sale had been upon a valid judgment in attachment, it would have inured to the benefit of other executions in attachment in the hands of the sheriff, so that they would be entitled to share in the proceeds of the sale in their order. But in the case supposed, the sale would be valid, and the proceeds would be for distribution upon valid final process in the sheriff's hands under the provision of the statute. But in the present case, the sale itself is on void process, and being itself void, there can be no proceeds to appropriate to the payment of valid executions. The money has been paid under a mistake of fact, and belongs to the purchaser as much as it did before he placed it in the hands of the sheriff. No proceeds can result from a void sale; and a sheriff's sale

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McCafferty v. O'Brien.

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founded on void proceedings, must itself be void as completely as any sale would be, which one man should make of another man's property without authority from the owner. We think it can make no difference that the sheriff had in his hands process on which he could have made a valid sale, so long as he advertised and proceeded under the void, and not under the valid writ.

Our conclusion is that the motion must be granted refunding the money paid by Good on the sheriff's sale.

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CATHERINE McCafferty, Plaintiff in Error, v. HANNAH O'BRIEN, Defendant in Error.

A. brings suit for damages against B. on the ground that in a previous suit between the same parties, by the fraud and false swearing of B, the judgment of the court was in his favor and against A. *Held*, such an action is not maintainable.

What once has been decided before a court of competent jurisdiction can not be brought into controversy in another suit, on the ground of surprise.

The plaintiff in error was plaintiff below, and in her petition set out: That the defendant was indebted to her, and to recover the debt she had brought suit before a magistrate. That she there proved her claim by her own oath, but the defendant, to the surprise of the plaintiff, denied the indebtedness, well knowing her testimony to be false. That the plaintiff, at the time of the trial, had no other evidence in her favor, and therefore the magistrate was compelled to give judgment for the defendant. That the plaintiff was not able to give the necessary security for an appeal, and the time allowed therefor had expired, but that she had since discovered testimony to prove her case; and that the defendant by her false swearing before the magistrate had obtained judgment fraudulently. The

amount claimed was the amount of the demand before the magistrate with \$100 damages.

The defendant filed a demurrer and the court below sustained it, and entered judgment for costs in favor of the defendant. Petition in error by plaintiff to reverse this judgment.

*Dickson & Murdock*, for plaintiff in error.

*O'Conner*, contra, cited *Grant v. Ramsey*, 7 Ohio St. 157.

HAGANS, J. It will be seen that this is not an action for a new trial or for the equitable interference of the court to prevent injustice, but a suit for damages growing out of an alleged fraud committed by the defendant on the plaintiff. This was the claim on the argument. The case is not framed with any other view, and would be clearly insufficient if it were. As a general rule, a plaintiff, after judgment against him, can not claim a new trial on the ground of being surprised by the defendant's evidence. *Cummins v. Walden*, 4 Blackf. 307. So a party is not entitled to a new trial on the ground of surprise, because the opposite party led him to believe that certain facts would not be disputed or would be admitted; and if the plaintiff chose to rest the proof of the fact of her case upon her own testimony, and was led by the defendant to suppose it would not be disputed, and after it was disputed and her testimony known, chose to assume the responsibility of a decision in her favor, disappointment in the result furnishes no ground for a new trial. The plaintiff took her course with due deliberation, and she must abide the consequences. She might have moved for a continuance, or have suffered a non-suit without prejudice.

The principles just stated are not stated because they apply to this case, but because their analogies furnish us a solution of it. Clearly, the judgment rendered is final, unless it was procured wholly by the fraud of the defendant, and can not be collaterally impeached.

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But though misled by the defendant, is not the plaintiff herself responsible for the result? She might have had a continuance of the cause or suffered a non-suit. She chose not to avail herself of either course. But with full knowledge of the alleged fraud, she chose to precipitate upon herself the very loss she seeks to recover in this action. Besides, after all this she might have appealed the case. This she neglected to do. The loss she alleges she has sustained, as she sues for it, has been the consequence of, and brought about by, her own negligence, and she might have avoided it if she had chosen to do so.

An old case, reported in Croke Eliz. 520, *Damport v. Sympson*, was an action on the case against the defendant for damages for falsely swearing in an action of trespass against himself, whereby the plaintiff recovered £180, when he would have recovered £500 but for the alleged perjury. But the court held the action was not maintainable, and say, among other reasons, "if this might be suffered, every witness would be drawn in question." See, also, *Eyres v. Sedgwick*, Cro. J. 601; *Harding v. Bodman*, Hutton, 11.

In Connecticut a suit has been maintained against a witness by means of whose fraud or perjury a judgment was obtained. See cases cited in *Peck v. Woodbridge*, 3 Day, 30. But Chancellor Kent, when Chief Justice of the Court of Appeals of New York, denied the propriety of it in *Smith v. Lewis*, 3 Johns. 157. This was a suit against a plaintiff who, in a former suit in another State, against the plaintiff in this action, had, by suborning a witness to swear falsely, obtained a judgment contrary to the truth and justice of the case. The chief justice says: "It would be against public policy and convenience; it would be productive of endless litigation, and it would be contrary to established precedent to allow the losing party to try the cause over again in a counter suit, because he was not prepared to meet his adversary at the trial of the first suit."

In this cause the judgment below will be affirmed.

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Bryant et al. v. Ohio College of Dental Surgery.

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E. C. BRYANT ET AL. v. THE OHIO COLLEGE OF DENTAL SURGERY.

No lien is created upon the real estate of a corporation by the following certificate: "Ohio College of Dental Surgery. This may certify that Dr. A. J. Reeves is entitled to one share of the real estate property of the college, drawing an interest of six per cent., and transferable only in accordance with the constitution of the college association."

A decree of sale of the property, founded upon said certificate for the interest as a lien, is erroneous.

The plaintiffs, who are the personal representatives of A. J. Reeves, deceased, are the owners of a written instrument, of which this is a copy:

*"Ohio College of Dental Surgery.*

"This may certify that Dr. A. J. Reeves is entitled to one share of the real estate property of the college, drawing an interest of six per cent., and transferable only in accordance with the constitution of the college association. Shares one hundred dollars each.

"CHARLES BONSALE,  
JAS. TAYLOR,  
JOHN ALLEN,  
H. E. PEEBLES,  
THOS. WOOD,

"CINCINNATI, February 20, 1854.

*Trustees."*

Upon this instrument this suit was brought for one hundred dollars, with interest from February 20, 1854; and the petition alleged that the certificate was a lien on the real estate of the defendant, and prayed sale thereof and payment of the amount stated.

To this petition the defendant demurred, and the demurrer was sustained. Thereupon the plaintiffs filed an amended petition, in which they claimed to recover the

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Bryant et al. v. Ohio College of Dental Surgery.

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*interest* alleged to be due upon the certificate, and alleged also, as before, that the certificate was a lien on the real estate of the defendant, and prayed sale and satisfaction.

To this amended petition the defendant again demurred, and at the April term, 1870, the demurrer was overruled and judgment was rendered in favor of the plaintiffs for ninety-six dollars, being the amount of the interest on the certificate; and the court decreed sale of the real estate of the defendant as prayed for. To the overruling of this demurrer and to the entry of this decree, the defendant excepted.

*E. L. Decamp and W. M. Ramsey, for plaintiffs.*

*King, Thompson & Avery, for defendant.*

HAGANS, J. The determination of the demurrer to the original petition seems to be decisive of some of the questions presented to us now. For if an action in the form contained in the original petition could not be maintained for the principal sum and interest, it would seem doubtful whether the action could be maintained in the same form for the interest merely due upon the principal sum named in the certificate. Besides, if this certificate be regarded as stock of the corporation, no time is fixed in the certificate for the payment of the interest; nor is there any fund alleged to be in the treasury out of which the plaintiffs have the right to be satisfied therefor. *Wright v. Vermont & Massachusetts R. R.*, 12 Cushing, 68; *Bernard v. Vermont & Massachusetts R. R.*, 7 Allen, 512; *Waterman v. Troy & Greenfield R. R.*, 8 Gray, 433; *McLaughlin v. Detroit & Milwaukee R. R.*, 8 Mich. 100.

If we regard this certificate as simply the promissory note of the defendant given for money loaned, then the plaintiffs have the right to a judgment for the amount with interest, but not a sale, in the first instance, of the

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property of the defendant as upon a lien securing the amount.

Without determining those questions it is very clear that the judgment below can not stand. No other lien appears in the case than the assertions of the certificate, which appear to be rather of an ownership *pro tanto* in the real estate of the defendant than of any other interest. And if there be no instrument providing a legal lien on the real estate of the defendant by way of security for the money named in the certificate, a decree for the sale of the property for the debt in the first instance, is unauthorized. If there be a lien at all, or right to a sale of the property, it must be asserted in some other form of action having regard to the rights of other holders of certificates and creditors, if there are any; and this we understand to have been the determination of the judge below.

On the whole case, we have thought it best to reverse the judgment and to remand the cause to Special Term for further proceedings,

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#### CHARLES STANLEY v. THE CITY OF CINCINNATI.

In a suit by a contractor against the city for a balance claimed as due for many items of work done and materials furnished in building the Commercial Hospital, the petition stating an account of many items and payments, and the answer denying its correctness, but averring that the account was of an intricate character such as could not be taken, except in a court of equity.

*Held*, that prior to the code, this would have been a subject for a proceeding at law or in equity, as the plaintiff might elect, and no order of reference could, without consent of parties, have been granted in a proceeding at law; but that under the code, the parties are entitled to both equitable and legal remedies, according to the nature of the subject-matter of the action, and an order of reference may properly be made, as in equity, to take and state an account between the parties.

This case was reserved, on a motion for a reference to a master, to state an account. The suit was brought by the

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plaintiff, a contractor, to recover a balance due from the city for many items of work done and materials furnished on the Commercial Hospital.

The answer of the city denies the indebtedness and states that it is a matter of complicated account, as shown by the petition.

The plaintiff claims that it is a common case of a suit for work and labor, as on the common counts in assumpsit, and that he is entitled to a jury.

*Hoadly, Jackson & Johnson*, for plaintiff.

*Walker, Conner & Warrington*, for defendant.

Taft, J. Before the code was adopted, this would have been a proper case for an action of assumpsit; and if such an action had been brought, the court would not, on motion, have given the equitable remedy of a reference. This was tried in the case of *Johnson v. Wallace*, 7 Ohio, 393. The court in that case, Judge Wood giving the opinion, said that while "a discretionary power vested in the court to settle controversies of this nature, in the manner proposed by the motion, would very greatly add to the probability of doing substantial justice between the parties," they were, nevertheless, satisfied that in the absence of consent, the court had not the authority; "for the constitution of Ohio, and the laws in pursuance thereof, gave to either party the right to submit his cause to a jury for trial, and to grant the motion would be to deprive the plaintiff of that right."

But the court added: "The difficulties arising in cases of this kind, however, may be avoided by a resort to a court of equity, which has concurrent jurisdiction with courts of law in cases of this description. Those long and perplexing accounts might then be referred to a competent master, and be far more satisfactorily adjusted."

From this decision in *Johnson v. Wallace*, we conclude



that if the same case had been on the equity side of the court, as it might have been, a reference might have been asked and granted. Under our present system, the parties are always in law or equity, or both, for all purposes of legal or equitable remedies or relief.

Under the former practice, equitable remedies could not be administered in a proceeding at law, even though the subject of litigation was one which was cognizable in equity as well as in law. In all cases pending in a court of law, the parties under the constitution had a right to insist upon a jury, although the same subject-matter was cognizable in equity; and although, if the same matter were pending in a court of equity, or on the equity side of the court, equity remedies and equity relief would be granted, and a jury could not be insisted upon. It would seem to follow from the opinion of the Supreme Court in *Johnson v. Wallace*, that in all that class of cases falling within the concurrent jurisdiction of law and equity, either remedy can be administered by the courts under the code without violation of the constitution.

The question then arises, whether the subject of this suit is within the concurrent jurisdiction of both law and equity. It is not a merchant's account. But we think that the equitable remedy of a reference was not confined to a mutual merchant's account. Any complicated account of many items, and mutual, might require a statement by a master or referee. A "long account" is the description used in New York. A few items on one side would not answer the description, and to grant a reference in a case not requiring that mode of proceeding, from its complication and difficulty, would be an abuse of the jurisdiction. But we think that the showing makes a case for a reference as an equitable remedy, according to the usages and understanding of equity proceedings at the time when the constitution was adopted. References of cases arising under contracts for making public improvements are more resorted to in the New York practice than

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in Ohio. But the provision of the New York code for references is substantially the same with our own, and we do not regard the constitutional provisions of the two States on this subject as materially different.

The question whether the plaintiff is entitled to a jury turns upon the inquiry whether this answer states a case requiring the equitable relief sought. The answer states, that the work done and materials furnished by the plaintiff were done and furnished under a contract, which fixed the rates of compensation to be paid, and that the defendant is willing to pay therefor according to the terms of the contract, but denies the correctness of the plaintiff's account as exhibited in his petition, and denies any indebtedness whatever. But it says that the account is of an intricate character, such as can not be properly taken except in a court of equity; "that the account contains one hundred and forty items, many of which are complex in themselves; that various payments have been made thereon of various dates, which are not set forth in the account as made, but simply as a lump credit;" that there is controversy as to most of the items charged, and the defendant prays for a reference.

We are satisfied that an account such as that described in this answer, and shown by the petition itself, is a proper subject of a reference, and that justice will be subserved by dealing with it in that way.

J. AND J. M. PFAU, Plaintiffs in Error, v. L. H. LORAIN AND JAMES CONLISK, AS L. H. LORAIN & Co., Defendants in Error.

In an action against joint contractors, a judgment in favor of one operates as a discharge of the other.

A. & B., partners as A. & Co., were sued on a partnership contract. B. answered, and A. was in default. The court below held the contract to be illegal, and gave judgment in favor of B., but judgment by default against A. *Held*, it was error to discharge one and not both.

Suit for \$1,339.78, price of liquors furnished defendants at their request. The defendants were keepers of a gambling house, and the liquors were used there as an accompaniment of their business. One of the defendants answered and one was in default. Both, however, had been served with process, and both testified.

The judge at Special Term gave judgment for the defendant who answered, and judgment by default against the other, to which the plaintiffs excepted.

*Forrest & Lindemann*, for plaintiffs in error.

*Hoadly, Jackson & Johnson*, contra.

STORER, J., gave the opinion of the court.

The plaintiff claims that there is error in the record in this case, committed by the judge who tried the case at Special Term, in this: 1st, that judgment was rendered against one defendant and in favor of the other, when the cause of action was joint, against both as partners; 2d, that the judge finding the liquors were to be used as part of the *modus operandi* of a gambling house, on that ground gave judgment for the defendant who had answered, and judgment for the whole amount claimed against the other, who was in default.

In thus deciding, we think the court below erred. The

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action was against joint contractors upon the same contract. If one could not be held liable, the other must be permitted to go without day.

It is the duty of the judge, whenever it appears that the cause of action is founded upon an illegal consideration, to dismiss the case. The law will not permit such an agreement to be enforced, nor will it lend its aid in any manner to the plaintiff who seeks to recover thereon. It does not depend upon the willingness of either defendant to permit judgment to be rendered against him, if it is evident that the claim asserted had no legal foundation.

Whenever it is sought to enforce such a demand, and it is clear it comes within the prohibition we have stated, it is the duty of the court to withdraw the case from the jury and non-suit the plaintiff. It can not be permitted that any distinction should be made between the debtors. If the foundation of the suit is opposed to good morals or is in violation of a statute, there can be no recovery, however willing the defendant may be to admit his liability; for the question at issue is not his assent to an alleged contract, but rather whether the contract can be enforced by legal remedies.

Other questions have been argued, but we do not think it necessary to pass upon them. As the judgment was not rendered against both parties defendant, it must be reversed, and the cause remanded.

HAGANS, J., dissented.

One of the defendants answered and the other is in default. There can be no such thing as a legal partnership in an unlawful or immoral business. The facts were found by the judge at Special Term to be, that the plaintiffs knew that the establishment kept by the defendants was a gambling house, as well as the uses to which the liquors sued for were to be put. The plaintiffs admit they knew the reputation of the house; and from the amount and kind of liquors furnished this house, as appears by the

petition, they are chargeable with knowledge. Besides, there was no pretense that they did not know that the defendants were not general dealers in this class of merchandise.

In *Pearce v. Brooks*, 1 Excheq. L. R. 213, it was determined by the whole court, that where an ornamental brougham was furnished the defendant, who was a strumpet, to be used for an immoral purpose, as part of a display merely, the plaintiff was chargeable with knowledge under the circumstances; and there was judgment for the defendant. The question of knowledge was left to the jury in that case as the same question was left to the judge below in this; and the court in that case refused to set aside the verdict of the jury, as I think the finding of the judge below, in this case, on the testimony, ought not to be disturbed.

It is a fact of common notoriety that liquors are used in gambling houses not merely as a display, but as one of the most important adjuncts of that business, and so intimate an accessory, that it is not carried on without them in our large cities.

While such a holding may work a hardship on these plaintiffs by the loss of the price of these liquors, still if they choose to run the hazard of such transactions, it will be only the result of their own act, and they can not complain.

One of the defendants was in default, and judgment was rendered against him for the whole amount. No exception was taken thereto by him, and he is not here complaining of that judgment. Nor is the plaintiff complaining either. I do not think the court *mero motu* ought to reverse that judgment though the cause of action is illegal. But at all events, if that judgment is reversed, I think this court, proceeding to render such judgment as the court below ought to have rendered, should render judgment in favor of this defendant also.

Judgment reversed and cause remanded.

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Irving National Bank of New York v. Thomas Emery's Sons.

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THE IRVING NATIONAL BANK OF NEW YORK, Plaintiff in Error,  
v. THOMAS EMERY'S SONS, Defendants in Error.

A transfer, by delivery, of a bill of lading, for a *bona fide* consideration paid, passes the title of the consignee to the property described, whether the bill is indorsed or not.

A., consigning goods to B., drew drafts on B., and attaching thereto the bills of lading, describing the property, sold the drafts to C. B., having received the goods, applied the proceeds to his claims against the consignor, and refused to accept the drafts. *Held*, the title to the goods passed, by the transfer of the bill of lading, to C., and that B. was liable to him for the amount of the drafts.

On the 24th of March, 1869, G. M. Mirrielies, in New York, drew a bill of exchange on defendants, a firm doing business in Cincinnati, payable on demand to his order, for \$299, which he negotiated the same day with the plaintiff, who advanced the money; whereupon the drawer, as collateral security, deposited with them a bill of lading, signed by an agent of the "Atlantic Time Line," admitting the shipment of three casks of stearine by Mirrielies, to be delivered to the defendants in Cincinnati. On the 26th of the same month, Mirrielies negotiated another bill with the plaintiff, drawn on the defendants, and payable to the order of the drawer for \$1,022, to secure the payment of which he deposited a bill of lading of a similar tenor to that already described, for the delivery of ten casks of stearine to the defendants in Cincinnati. These drafts contained a memorandum on their face, that one was drawn on account of three casks of stearine, and the other of ten casks, and, with the bills of lading attached to them, were forwarded to Cincinnati, where they were severally presented to the defendants for payment, which was refused. The defendants, in due course, received the several shipments of stearine named in the bills of lading, and converted the same to their own use, claiming that

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they were the factors only of Mirrielies, and had the right to apply the proceeds to the payment of a claim they professed to hold against him.

There had been previous consignments made to the defendants, by Mirrielies, who, it is admitted, then acted as their agent to purchase stearine in New York, with power to draw on them for the price; but it was claimed by the defendants that the property now in controversy was not received by them under the previous authority given to the shipper, while it is asserted by Mirrielies his agency never had been revoked, and the purchase was made in good faith, the defendants being duly advised of the fact.

Judgment was given at Special Term for defendants, which decision was sought to be reversed.

*J. H. Bates & Clement Bates*, for plaintiff in error.

1. The validity of a transfer of a bill of lading, without indorsement to pass title in goods, is well settled. *Allen v. Williams*, 12 Pick. 297; *Marine Bank of Chicago v. Wright*, 46 Barb. 45; *Rochester Bank v. Jones*, 4 Comst. 497.

2. Delivery to carrier named by consignee not conclusive. *Mitchell v. Ede*, 11 Ad. & El. 888; *Turner v. Trustees, etc.*, 6 E. L. & E. 597.

*King, Thompson & Avery*, contra.

1. When Mirrielies mailed the invoices to defendants and delivered the shipments to carriers named by them, the property in the goods *prima facie* passed to them. *Chitty on Carriers*, 97, 124; *Benjamin on Sales*, 130, 514, 658; 8 Term, 330; 3 B. & P. 582; 5 Ohio R. 100; 1 Gray, 542; 1 Johns. 214; 14 Wend. 546; 22 N. Y. 368.

2. The bills of lading in the case at bar were not negotiable by the shipper, because not made to him, or to order, or to bearer. *Stanton v. Eager*, 16 Pick. 467.

STORER J. This action is brought to recover the value of the property described in the bill of lading, and the

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question is presented, what title did the plaintiff acquire by the deposit of the bills of lading when the drafts were negotiated?

Since the decision in *Lickbarrow v. Mason*, 2 T. R. 75, it has never been doubted that the transfer of a bill of lading by the consignor, as a general rule, transfers the property it describes, if made for value and in good faith; and although the presumption may well be that the consignor, by the shipment and the carrier's contract to deliver to the consignee, has parted with his claim as owner, the fact is not conclusive, but may yet be explained by the circumstances.

When the plaintiff purchased the drafts drawn by Mirielies, and received from him the bills of lading, the transaction between the parties was not an idle ceremony. A legal or equitable claim to the property was vested by the act of delivery.

It was so held by Judge Washington, in *Walton v. Ross et al.*, 2 Wash. C. C. 283, that the indorsement and delivery of a bill of lading, or the delivery of the bill without indorsement, amounted to a transfer of the property.

The same point had been previously decided by Gibbs, C. J., in *Nathan v. Giles*, 5 Taunton, 558, whose language is: "The property in a cargo, for which the master of a ship had signed bills of lading, may be transferred by delivery without indorsement of the bill, and the transfer will be good against all the world, except subsequent indorsees for a valuable consideration." This was also the ruling in *Alton v. Williams*, 12 Pick. 302, where the court say: "The delivery of an informal or unindorsed bill of lading by the shipper would be a good symbolical delivery so as to vest the property in the plaintiffs." The same point was decided in *Bank of Rochester v. Jones*, 4 Comstock, 497; where the bank had loaned money, and to secure it "a forwarder's receipt was deposited by the borrower." The conclusions of the court in this case were adopted by Davis, C. J., in his opinion in *Rawle & Seymour*



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v. *Deshler*, 3 Keyes (40 N. Y.) 577, to sustain two propositions: *First*, That the delivery to the bank of the carrier's receipt was a symbolical delivery of the property it described. *Second*, The delivery of the carrier's receipt or bill of lading to the bank, for a valuable consideration, passed to the bank the legal title to the property. See also 1 Parsons on Shipping, 140.

Upon principle, then, we are satisfied it is immaterial whether a formal transfer of the carrier's receipt, at the time it is deposited, is made by indorsement or not. Sufficient is it that it is voluntarily delivered in good faith to secure a discount at a bank, or the loan of money; and it is immaterial whether the court should consider the title derived by the party was legal or equitable. We must hold, then, that when the property in litigation was received by the defendants, it was subject to the right of the plaintiff to be paid its full value, whether it is regarded as owner, or the holder of a lien, to the extent of their advances.

The whole controversy is between the plaintiff and the defendants, and it is clear the defendants can not intervene with any claim against Mirrielies, who had parted with his interest at the time the bills were discounted by the bank in good faith, of all which the defendants must have been fully advised, as the drafts, when presented for payment, were accompanied by the bills of lading, and the drafts themselves purported to have been drawn against the purchase money of the property described in the bills. Moreover, the defendants insist by their answer, and one of them testifies, that the shipment to them was regarded as an ordinary consignment, and not as purchased for their benefit. They have thus placed themselves in this relation to the parties: receiving property which did not belong to the consignor, of which, as already remarked, they must have been advised; disposing of the same without authority from the plaintiffs, and withholding the

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proceeds from them, on the ground that they have an unsettled claim against the consignor.

If this ingenious method of discharging a debt against one individual, by appropriating the property of another to its payment, should be sanctioned, it would introduce an anomaly hitherto not supposed to exist in the law or the ordinary dealing among merchants.

In any view the court may take of the case, the question might be asked: Who is entitled, "*ex aequo et bono*," to the proceeds of the property in dispute. It has been sold and so much money has been received to the use of some one. It can not certainly belong to Mirrielies, for he had parted with his entire right when the property was shipped. It can not be the property of the defendants, for they have no claim upon the plaintiffs which can authorize them to retain the money. The plaintiffs are, on every principle of equity, entitled to the protection of the court.

At Special Term, one of the judges of this court, on the facts before him, held the plaintiffs could not recover in this form of action; but on a full and more careful consideration of all the facts, all the members of the court are now of opinion that the plaintiffs made out their cause of action in Special Term.

The judgment should, therefore, be reversed.

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THEODORE ROYER, S. T. J. COLEMAN, AND JOHN YOUNG, Partners as ROYER, COLEMAN & Co., Plaintiffs in Error, v. MARY AYDELOTTE, Defendant in Error.

The members of a firm are jointly liable for the fraud and misrepresentations of one partner made in the course of the partnership business, though without the knowledge of the other partners.

ERROR TO SPECIAL TERM.—The facts are stated in the opinion of the court.

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*Collins & Herron*, for plaintiffs in error.

*Jordan & Jordan* and *N. C. McLean*, contra.

STORER, J. The defendants seek to reverse a judgment rendered against them, in the plaintiff's favor, at Special Term.

The petition stated that the plaintiff was the owner of and had the possession of a government voucher, given to Peacock & Son for work performed by them for the United States. This represented \$1,441.40, and was delivered to the plaintiff to discharge a liability owing to her by the original holder. She was fraudulently induced to part with the possession thereof, temporarily, at the suggestion and by the persuasion of her son, who was prompted to do so by Coleman, one of the defendants, who afterward obtained the money due thereon from the proper officer, and appropriated, as the plaintiff charges, the whole amount to the use of the defendants.

An answer was filed denying all fraud, admitting the receipt of the voucher, the payment of the money, and the appropriation of the sum of \$1,000 to a debt due the defendants from Peacock & Co.

The plaintiff replied, traversing in general terms the defendant's answer.

On the trial in Special Term, the case was submitted to a jury, who rendered a verdict for the plaintiff for the whole amount of her claim.

A motion was made for a new trial, which the court overruled, and the plaintiff now assigns for error:

1. That improper testimony was admitted.
2. That there was error in the charge to the jury.
3. That there was error in overruling the defendant's motion for a new trial.

The testimony, though somewhat conflicting, very clearly established the ownership of the voucher by the plaintiff; that it was obtained from her by her son, through the advice and upon the suggestion of Coleman, who appears to

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have studied carefully how he might accomplish his purpose, no matter what misrepresentation was required to effect his object. He had no claim to the voucher, either equitable or legal; nor does he seem to have known of its existence until informed of the fact by the plaintiff's son; when, by artifice and a suppression of the truth, as well as false assertions on the part of Coleman, the plaintiff was induced to give up the instrument to be retained merely until the return to Cincinnati of one of the firm of Peacock & Co., then doing business at the South.

We do not perceive that there is any error in the rulings of the judge in the admission or rejection of testimony, or in his charge to the jury; nor do we find that the weight of the evidence does not sustain the plaintiff's claim. If there was conflict in the testimony, it is not our function to reconcile it; and, even if it were, we should have but little difficulty in arriving at the same conclusion with the jury.

The only doubt we have had is, whether the very reprehensible conduct of Coleman has made the other defendants liable for the entire sum represented by the voucher, or only for so much as the copartners actually received.

It appears that after the defendant's claim against Peacock & Co. had been paid, the balance of the sum received by Coleman was given, through the intervention of the plaintiff's son, not to his mother, but to Peacock, who was then and still is insolvent, thus depriving the real owner of the entire amount represented by the voucher.

While it may be a hard case for the other defendants, who did not participate in Coleman's conduct, in the mode in which he obtained the voucher, we are satisfied the law of the case imposes a joint liability upon all the partners for the acts of the individual members.

We find the rule thus stated by Judge Story: "The principle extends further, so as to bind the firm for the frauds committed by one partner in the course of the transactions and business of the partnership, even when

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the other parties had not the slightest connection with, knowledge of, or participation in the fraud. And so if representations of certain facts as existing are fraudulently made by one partner, unknown to the others in the partnership business, and the facts never existed, but the whole statement is a mere fiction, the firm will be bound to the same extent as if it were true and the facts existed." Story on Partnership, sec. 108, and cases cited thereunder.

This principle necessarily follows from the relation which partners sustain to each other, and attaches to the connection they have formed. They thus declare to the world that they are satisfied with the good faith and integrity of each other, and impliedly undertake to be responsible for what they shall respectively do within the scope of the partnership concerns. Gow on Partnership, 55, 146; Watson on Partnership, chap. 4, p. 175.

We must leave the defendants, who are made to suffer, to their remedy against Coleman, who is unquestionably liable to them for any loss they have sustained.

The judgment at Special Term will be affirmed.

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DELL CAMERON AND WIFE v. J. W. HOLENSHADE ET AL.

Where a partition of lands among heirs was effected by a sheriff's sale, and a part of the property was purchased by one of the heirs, who afterward sold and conveyed it, at private sale, to a purchaser, who entered into possession and made valuable improvements without any actual knowledge of the equitable lien for the purchase money in favor of the other heirs, who stood by and saw such purchaser make the improvements without advising him of the lien: *Held*, that such purchaser at private sale was entitled to the benefit of the occupying claimant law, as against the lien, and to be reimbursed out of the proceeds of a resale of the property in a suit afterward brought by the other heirs to enforce the lien, to the extent of the value which he had added to the property by the improvements.

Where an innocent purchaser has received a deed of general warranty, and has paid off and canceled on the record certain mortgages which he

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assumed as part payment of the purchase money, a court of equity will disregard such cancellation and hold the mortgages valid subsisting liens in the hands of the purchaser to protect him against the claims of junior incumbrancers.

This case was taken to the General Term, in part by reservation, and in part by a petition in error.

Under a decree in a partition suit among the heirs of Isaac Golden, a sale was had of valuable real estate on the 3d of May, 1867, and Mary J. Holensshade, one of the heirs, became the purchaser of the property in question in this case, situated on the west side of Elm street, for \$18,100; and also of other property belonging to the estate. The sale was confirmed by the court June 27, 1867, and a deed was ordered, and made and delivered. In the decree of confirmation, the court found that the property was incumbered by a mortgage executed by Isaac Golden to Susan Ruffner in 1859, amounting to \$2,270, with interest, and ordered the deed to be made subject to said mortgage. The court further found that George W. Golden, one of the heirs, had mortgaged his interest (one-sixth) in all the property of the estate of his father, of which estate this property was part, to secure to Alexander Long \$5,254, and to Robert Boake \$5,230.75, and ordered, with the consent of the mortgagees and all the parties, that said security should be transferred from the undivided one-sixth of the whole to this specific property, situated on the west side of Elm street, by the execution of two mortgages by Mrs. Holensshade to Long and to Boake for their respective amounts, and that the mortgage of G. W. Golden on the undivided one-sixth should thereupon be canceled; and George W. Golden was to be charged for the amount of these two mortgages, as so much received of his distributive share, and Mrs. Holensshade credited with the same amount on her purchase.

The same decree secured to the other heirs the amounts coming to them, respectively, out of the proceeds of the sales of all the property. The entire sales amounted to

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\$84,000, of which Mrs. Holensshade was the purchaser to the extent of \$57,100. But the property in question, in this case, is on the west side of Elm street, while the other property purchased by Mrs. Holensshade, at the same time, was on the east side of Elm street. In pursuance of the decree, Mrs. Holensshade executed mortgages on this property on the west side of Elm street, the title of which is now in question, to Long and to Boake, which mortgages were recorded.

On the 11th of February, 1868, Stephen Gibson and Robert H. Gibson purchased, at private sale, the property in question, viz: on the west side of Elm street, from Mrs. Holensshade, for \$18,600, thus incumbered, and received a deed of general warranty therefor, with full covenants, by which they became entitled to a clear and unincumbered title from Mrs. Holensshade, and to be protected therein under the warranty.

Under these circumstances, they paid off these liens, amounting in all to \$14,766.16, and took credit for that amount as paid on the purchase, and the balance of the purchase money, \$3,833.84, they paid to Mrs. Holensshade. They took immediate possession and proceeded immediately to make valuable and permanent improvements to the amount of \$5,500. There is no controversy as to the fairness of the price paid by the Gibsons.

The plaintiffs, the wife of Dell Cameron being one of the Golden heirs, claimed to subject this property to the payment of their equitable lien for the purchase money, on the ground that it existed at the time of the sale of this property by Mrs. Holensshade to the Gibsons. The property has been sold, in this case, for \$16,666.67, and the questions to be decided relate to the distribution of this fund.

*S. T. Crawford, and Long, Hoeffler & Kramer, for plaintiffs.*

*Huston & Shunk and Henry Snow, for defendants.*

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Taft, J. The first question we shall consider is, whether the Gibsons are entitled to the benefit of the occupying claimant law. The decision and judgment at Special Term was in favor of the claim, and this part of the case comes up on the petition in error. It is claimed that this ruling ought to be reversed, because at the time of the purchase and improvements made by the Gibsons, the suit was pending under which the liabilities were ascertained that made the sale of this property necessary to satisfy the liens against it. We are all satisfied, as the judge at Special Term was, that the Gibsons took the title of Mrs. Holensshade in good faith, supposing that it was clear and unincumbered except by the mortgages already mentioned, which the Gibsons paid, and that all the litigation then pending ended with the confirmation of their purchase, and that they supposed they became by the purchase the owners of the property. They were in quiet possession under the decree of the court and their deed.

The claims on which this property has now been subjected to sale and taken away from the Gibsons, were expressly charged upon the other property, or were ordered by the court to be paid out of the proceeds of the sales of other property, and the equitable liability by which this property has now been sold was not apparent, and not such as to make the Gibsons, as purchasers, occupy the position of purchasers *pendente lite*.

The improvements which they put on the property were necessary and judicious, and made in good faith, and the evidence shows that they added to the value of the property an amount equal to their cost.

The paper title, under which Mrs. Holensshade held possession, was under the decree of court, and the title of the Gibsons under her, was regular and by deed of warranty.

The ruling at the Special Term took nothing from these parties who dispute the claim. It left them the proper proceeds of the sale of the property, as it was before the



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purchase by the Gibsons. It only gave the Gibsons the benefit of what they had in good faith added. This, we think, is in accordance with the decisions of the Supreme Court of this State.

The sale of the property on an adverse proceeding, we consider equivalent to an eviction. It is in fact an eviction. But if it were not so, we think that under the circumstances of this case, we could not, as a court of equity, allow these claimants, who stood by and suffered the Gibsons, without notice, to expend their money in improving this property, after the improvements were made, to spring this contingent claim upon them, and take away not only the property for which they had paid a full and fair price, but the value of their improvements also.

The next question to be considered is, whether the Gibsons, by paying off the mortgages to protect their title, have precluded themselves from claiming the benefit of these mortgages in the distribution of the proceeds of sale, by allowing them to be entered as satisfied. If the Gibsons, when they paid off these mortgages, had taken an assignment of them, instead of canceling them, they could have stood upon them as a plank with which to escape from the wreck. We think that, in the eye of equity, their relation to junior incumbrancers is not affected by the ceremony of canceling the mortgages. By paying them, under the circumstances of this case, they became substituted to the position of the mortgagees, so far as such a substitution was necessary to protect them from the injustice of having a junior incumbrancer force them to pay for their property more than once.

A court of equity will not countenance a speculation of this kind upon the money of an innocent purchaser; and in determining the question whether the purchaser in such a case had notice, we inquire as to his actual and not his mere constructive knowledge of the junior incumbrancer's claim.

The effect of the claim for these junior claimants would

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be to postpone those prior mortgages to these junior judgments, which the Gibsons were not compelled to do, and never could have intended to do, and never would have done with actual knowledge of the junior claims. What equity then, or what reason is there, to justify us in interpreting their conduct in a manner inconsistent with what we are morally certain was their purpose?

The property sold at sheriff's sale, under the claims of these junior incumbrancers, on the 18th June, 1870, for \$16,666.67.

The amount of the incumbrances paid by the Gibsons, as we have seen, was, at the time of their purchase, \$14,766.16, and the value of the improvements put on the premises, as proven, \$5,500, making a total of \$20,266.16, besides interest for more than a year and the costs of these proceedings, a sum largely exceeding the proceeds of the sheriff's sale.

The result is to leave nothing of the proceeds of sale to be appropriated on the claims of the plaintiffs and other junior incumbrancers.

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R. W. TOOKER v. HENRY GROTENKEMPER.

The words, "grants, demises, and leases," in the absence of other covenants in a lease, imply a general warranty of quiet possession to the lessee. But where there is a covenant for quiet enjoyment, as regards the lessor or those claiming under him, no such general warranty exists. The implied covenant can not be broader than the express covenant.

The grantee of the equity of redemption, in property mortgaged by a former owner, leased the premises with the above covenant. The mortgagee foreclosed, and ousted the lessee. *Held*, the lessee had no right of action against his lessor.

RESERVED TO GENERAL TERM.—The facts appear in the opinion.

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*E. P. Bradstreet, and Lincoln, Smith & Warnock*, for plaintiff, cited *Howes v. Brushfield*, 3 East, 491; *Lock v. Furze*, 1 Com. Pl. (L. R.) 441; *Robinson v. Harman*, 1 W. H. & G. (Ex.) 850; *Rolph v. Crouch*, 3 Ex. (L. R.) 44; *Foote v. Burnett*, 10 Ohio, 317; *Childs v. Childs*, 10 Ohio St. 339; *McAlpin v. Woodruff*, 1 Disney, 339; *Same Case*, 11 Ohio St. 120; *Sedgwick on Damages*, pp. 58, 77, 78, 86, 176, 196-198.

*Hoadly, Jackson & Johnson*, contra.

HAGANS, J. It appeared that one Henry Rosenham executed two mortgages, in March, 1865, to Samuel N. Pike, to secure a large amount of money, on certain premises on the south side of Fourth street, known as No. 255 West Fourth street; that in June, 1867, Rosenham being then the owner of an equity of redemption in said premises, conveyed it to the defendant in consideration of \$7,000, a sum much less than the actual value of the premises; that on the 8th of November, 1867, said defendant leased to the plaintiff the same premises for a term of three years, with the privilege of two years more, at the annual rent of \$2,000, payable monthly, and the defendant covenanted, among other things, that if the plaintiff observed and kept his covenants and paid the rents, that he should "lawfully, peaceably, and quietly hold, occupy, and enjoy said premises, during said term, without any let, hindrance, ejection, or molestation by said lessor, or his heirs or assigns, or any person or persons lawfully claiming under them." The plaintiff entered into the possession and enjoyment of the premises under the lease.

On the 18th of January, 1868, Pike, the holder of the Rosenham mortgages, then amounting to about \$22,000, brought suit to foreclose them; to which suit, both plaintiff and defendant were made parties, and the plaintiff filed his answer, setting up his lease and praying the protection of the court. The premises were sold, the sale confirmed, and the court found that plaintiff "had no

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interest in, or right of possession to, the premises as against the said Samuel N. Pike," and decreed a conveyance to the purchaser. This decree was entered June 8, 1868, from which it appears that the property sold for less than the incumbrances on it. The petition in this case alleges, and it is admitted, that in August, 1868, less than a year after the making of the lease, the purchaser, at the sale under the proceedings in foreclosure, gave the plaintiff legal notice to quit the premises within thirty days, or be ousted by legal process, and thereupon he was compelled to remove summarily therefrom.

It seems that the plaintiff used the house for the treatment of diseases by the "Swedish Movement Cure," being in the nature of a hospital, and requiring a large amount of machinery, apparatus, and appliances. He avers that he described to the defendant the uses to which he proposed to put the property before the execution of the lease, and fitted it up accordingly at a considerable expense, and expended for advertising other sums of money, in all amounting to \$1,193.24, the details of which appear in the proofs; that the house was full of patients and his business prosperous; that he removed from the premises, in consequence of the notice to remove, his patients, together with his whole establishment, to the interruption and partial breaking up of his business, and that he found it impossible to find another house having the size and other advantages of the one he had leased from the defendant. It is admitted that plaintiff paid his rent up to the sale under the proceedings in foreclosure, and in other respects observed the covenants of his lease. Upon these facts he demands judgment for two thousand dollars damages against the defendant.

It appeared in the testimony of the defendant that the lease or term was worth nothing, or at least had no market value, though plaintiff stated that he had sublet portions of the premises, so that the premises cost him, in rent, only \$900 per annum. He also stated that he was obliged

to pay for his present establishment, on Fifth street, \$1,200 per annum rent, and one witness testified that the size, location, and adaptation of the Fourth street premises made them more desirable and preferable compared with the Fifth street premises, and that "the difference in dollars is considerable."

The defendant denied that plaintiff was obliged to vacate the premises, but did so voluntarily; and denied any damage from any act of his, or any damage whatever, or any indebtedness.

The cause was reserved here for the decision of this court on the law and the evidence.

Two questions present themselves: *First*, Is defendant liable at all? and *Second*, If so, to what extent?

There is an allegation in an amended petition that the defendant, in the purchase from Rosenham, assumed the payment of the mortgages to Pike.

No answer is filed to this amended petition, and no proof of any written or express verbal assumption of the mortgage debt appears. But, under this undenied allegation, we should be bound to conclude that the defendant, by a contract to pay the mortgage debt, had devolved upon himself the legal duty to do so. And out of this legal duty we think there could be no doubt that there would arise, on the part of the defendant, the obligation to make good any damages for a breach of the covenant for quiet enjoyment contained in this lease. *Howes v. Brushfield*, 3 East, 491.

On the argument, however, any such assumption by the defendant of the mortgage debt was denied. Leave was asked to file an answer to the amended petition, to which the party is entitled. We are to consider the case, then, as if such a denial were made; and the allegation untrue.

In this lease the defendant "grants, demises, and leases" to the plaintiff the said premises. These words, in the absence of any other covenant, imply an undertaking, on the part of the lessor, that the lessee shall have undis-

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turbed possession during the term; and the law supposes that when a man makes such a lease he has a good title to the property and power to lease it. Taylor's Landlord and Tenant, pp. 214, 216, and cases cited.

The covenant extends to possession only, and means that the lessee shall not be evicted by paramount title. But here, the implied covenant for quiet enjoyment generally, contained in the words "grant and demise," is limited and restrained by the terms of the express covenant for the quiet enjoyment of the lessee "without any let, hindrance, ejection, or molestation by said lessor, or his heirs, or any person or persons lawfully claiming under them." The implied covenant shall never be broader than the express covenant.

The case of *Howes v. Brushfield*, 3 East, 491, was cited to us as conclusive of this case; but there the court held that the vender, conveying by the usual words "give and grant," and covenanting for quiet enjoyment against his own default, was liable for rent due at the time of the conveyance, though it did not accrue during the time the vendor held the estate. *Expressum facit cessare tacitum*. *Merrell v. Frame*, 4 Taunt. 329; *Kent v. Welsh*, 7 Johns. 258.

There is nothing in this lease or in the testimony, that puts on the defendant any obligation to pay these mortgages. He could do so or not as he chose; and there rested against him no personal liability in favor of the mortgagee if he did not choose to pay them, even if the property was insufficient to satisfy the mortgage claims. In the transaction he had at risk the equity of redemption merely, which he had purchased, and which he might lose if he chose to do so. It will be observed that the defendant at no time held the legal title to this property—only an equity of redemption.

The mortgagee had the legal title, and after condition broken had the right of entry and possession of the premises. Suppose he had done so and evicted the plaintiff,

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would there have been any action against the defendant on the covenant for quiet enjoyment? We think not. But, instead of doing this, he brought his action to foreclose the mortgages, and under him, by virtue of that proceeding, the purchaser took title, and it was that title that ousted the plaintiff.

"Ever since *Frische v. Kramer's Lessee*, 16 Ohio, 125," says the Supreme Court in *Childs v. Childs*, 10 Ohio St. 399, "it has been regarded as the settled law of this State, that the purchaser at a judicial sale in such case acquires the title of the *mortgagee*." The purchaser claims under him, and had the same right to enter and occupy the premises which the mortgagee had prior to the sale, after the condition of the mortgage was broken. The effect of the decree and sale is simply to bar the equity of redemption.

Of the condition of the title the plaintiff is chargeable with notice, being of record, and it must be presumed that he took possession subject to the contingency that actually happened and for which the lease provided. The covenant has reference merely to the undisturbed possession of the lessee and not the lessor's title. And we have seen that the parties have limited the liability of the defendant to a case which has not happened. *Bricker v. Bricker*, 11 Ohio St. 240; *Waldron v. McCarty*, 8 Johns. 464.

As was said by the court in 11 Ohio St. 240: "It was the right of the parties to make their own contract, and whether general or special, it can only have effect according to their express terms. The covenant against incumbrances was a special one, being only in regard to incumbrances 'done or suffered' by the grantors. The incumbrance complained of was imposed upon the lands by others and before Waddel had acquired the title, and does not appear to have been done by his act or assent, and is not therefore within his covenant against incumbrances;" and there was judgment for the defendants, though there was a cove-

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nant of general warranty in the conveyance made by Waddel.

Our Supreme Court have thus decided the principle of this case, and this view of it makes it unnecessary to pass on the other points suggested to us, or to examine the authorities cited.

There must be judgment for the defendant.

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W. S. PATTERSON *v.* SAMUEL B. KEYS & Co.

A stock and gold broker in Cincinnati received from a customer \$4,000, on account of margin on \$40,000 of gold to be purchased, together with an order as follows: "Buy for my account and risk \$40,000 gold, limit 44½ to-day, upon which I agree to keep ten per cent. margin in cash. If the said margin is not kept good, you are authorized to buy or sell the same at your discretion." The broker purchased the gold through an agent in New York, where it was kept on deposit in bank, and the customer failing to keep up the ten per cent. margin, the broker, upon sufficient notice, sold the gold at a loss:

*Held*, that the customer could not recover back the money deposited as a margin on the ground that the broker had failed to comply with his contract, although he kept the gold, when purchased in a bank in New York, in his own name and not in the name of the customer, nor in a separate parcel, but subject to his order, in accordance with the well-known usage in that kind of business.

**ERROR TO THE SPECIAL TERM.**—This is a suit for deposits made by the plaintiff with the defendants, amounting in all to \$6,000, with which for commissions and reward to buy gold coin for the plaintiff, which, it is alleged, the defendants neglected and refused to do, and afterward on request to repay the said deposits, they refused. To the petition are attached three exhibits, dated September 17, 19, and November 2, 1867, respectively, for the several sums of \$4,000, \$1,000, and \$1,000, viz:



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"CINCINNATI, September 17, 1867.

"Received from Mr. W. S. Patterson, four thousand dollars on account of margin for \$40,000 gold.

"SAMUEL B. KEYS & Co.

"Lea."

The other exhibits are of like tenor, but of different amounts, as stated.

The defendants answered, admitting the receipt of the deposits, but that they were received under written contracts, in each case, of the following tenor:

"MESSRS. SAMUEL B. KEYS & Co: Buy for my account and risk, forty thousand dollars gold, limit  $44\frac{1}{2}$  to-day, upon which I agree to keep ten per cent. margin in cash. If the said margin is not kept good, you are authorized to buy or sell the same at your discretion.

"W. S. PATTERSON.

"CINCINNATI, September 17, 1867."

The defendants aver that they accepted the agreement and received the money under it; and that on the respective days when the deposits were made, they bought the several named sums of gold, viz: \$40,000 at  $44\frac{1}{2}$  premium, \$10,000 at 44 premium, and \$10,000 at  $40\frac{1}{2}$  premium, according to the contract, and notified the plaintiff thereof; that in all respects they complied with the contract in buying the gold, and rendering the plaintiff monthly accounts, to which he took no exception, but that the plaintiff did not keep his margin good according to the contract, though notified to do so; and finally on sufficient notice, on the 9th of December, 1867, they sold the gold at  $86\frac{1}{2}$  per cent. premium, of which sale they notified the plaintiff and rendered him an account thereof, to all of which he took no exception. They deny that any demand of the deposits was made by the plaintiff, and aver as the result of the transactions, that they are indebted to the plaintiff in \$179.15 which they are ready to pay and offer to confess judgment to that amount. The statement of

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account in detail is attached to the answer, showing that balance to be due to the plaintiff. To this answer the plaintiff replies, denying that the defendants made the several purchases of gold for the plaintiff and in his name, or that they sold said gold for him.

The cause was tried at the February term, 1870. It appeared that Keys & Co., who were gold and stock brokers in Cincinnati, immediately upon the deposits being made and the orders given, telegraphed to their correspondents in New York, Lockwood & Co., who were large dealers in gold, to make the purchases, and they did so; and Lockwood & Co. advised Keys & Co. accordingly, the amounts bought for the plaintiff being noted. Keys & Co. notified the plaintiff of the purchases. It appeared that Lockwood & Co., who did not know the plaintiff in the transaction, actually obtained the gold and held it for Keys & Co., who could have obtained it at any time, as that was the arrangement they had with Lockwood & Co. It did not appear to have been the purpose of the plaintiff to obtain the gold actually; but that he purchased it for speculative purposes merely, putting up the stated ten per cent. margins, to provide against the contingency of its falling below the price at which it was purchased. The gold appears to have been at all times under the control and subject to the order of Keys & Co. who, in fact, held it by way of pledge as security for the money that had been advanced to buy it, though in the hands of Lockwood & Co., and the plaintiff could have obtained it at any time upon paying for it. The specific sums of gold named by the plaintiff in his orders were purchased by Lockwood & Co., and those specific sums were in fact at all times subject to the plaintiff's order. After the purchases were made, gold declined until the margins were about exhausted, and then, upon sufficient notice, it was sold, leaving in the hands of Keys & Co. the admitted sum coming to the plaintiff. It appeared that every step of the whole transaction was understood by the plaintiff, who had some experience, and that

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both Lockwood & Co. and Keys & Co. were entirely solvent, and kept on hand constantly large amounts of gold, and could have delivered the gold to the plaintiff at any time by his paying for it the advances and expenses.

On this state of facts, the court at Special Term rendered judgment for the plaintiff for the amount admitted by the defendants to be due to him. A motion for a new trial was made, which was overruled, and a bill of exceptions taken embodying the testimony. The cause is in General Term on error to the judgment of the court below.

*Fox & Bird*, for plaintiff.

*Collins & Herron*, for defendants.

HAGANS, J. There is substantially but one issue made by the pleadings, and one question made on the argument, as follows: Did the defendants in fact make the several purchases of gold for the plaintiff? If so, we understand it to be conceded that the judgment is right. Some objections to the competency of certain evidence admitted by the judge at the trial were made; but these, we understand, are not now insisted upon. Was then the contract executed?

We have been unable to find a case involving similar transactions in which the precise question at bar has been raised; but the cause assimilates itself to cases involving the same principles. The question makes it necessary to notice briefly the nature of the transaction.

It is apparent that the plaintiff knew the method of these transactions, as carried out in this city, and that the gold was not to be bought here. The plaintiff bought no gold of the defendants. The defendants sold no gold to the plaintiff. But both parties understood that the gold was to be bought from a third person in New York, and that the defendants would pay to that person the market value of the gold with the margin of ten per cent. furnished by the plaintiff, and ninety per cent. of their own

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money. In the transaction it was not expected by either party that the plaintiff would purchase for the purpose of personally holding the gold, but solely for the chances of gain by a sale when the market price should have risen. For this purpose he agreed to keep the defendants indemnified from all loss upon the gold by keeping in their hands, at all times, ten per cent., in case gold depreciated in the market. What then was, among other things, the result of the agreement? The defendants agreed on their part to buy the gold, to advance the ninety per cent., to hold it subject to plaintiff's order, and if there were a gain, it would be the plaintiff's and not the defendants', to have actually in their name or under their control the gold purchased, and to deliver it upon request to the plaintiff when paid for by him, or to sell upon his order.

The plaintiff agreed to pay the ten per cent. as a margin, to keep that margin good according to the fluctuations of the market, and to take the gold whenever required by the defendants, and pay the difference between the amount paid for it by them and expenses, and his margin. *Horton v. Morgan*, 19 N. Y. 170; *Markham v. Jaudon*, 41 N. Y. 239.

These two cases are well considered and embody all the law of this case, and settle, to our minds satisfactorily, the principles we have enumerated which lie at the foundation of legitimate dealing in this class of business. The case in 41 N. Y. 239, expressly overrules *Hanks v. Drake*, 49 Barb. 186, and *Sterling v. Jaudon*, 48 Barb. 459. These transactions have substantially the nature and attributes of pledges. The mere fact that the gold, when purchased, was not manually delivered to the plaintiff and redelivered by him to the defendants, by way of security for advances, does not change the actual character of the transaction. Though the ultimate property of this gold vested in the plaintiff the moment it was purchased, yet by directing these purchases to be made in the mode designated, he must be understood as consenting that the business should be done

in the usual manner—among other things, that the title and possession of the property should remain in the defendants, after being purchased by them in their own name. “No breach of duty,” says the court, in 19 N. Y. 170, speaking of shares of stock, “was committed by the defendant in purchasing in his own name. As he was to hold the stock as security for the balance of purchase money which he had advanced, it was proper and entirely consistent with the nature of the transaction, that he should take the title in his own name. If default were made, he would have a right to sell to reimburse himself, and he would be obliged, in that event, to give a title to the purchaser.”

But it is urged that this gold should have been kept separate, so that the plaintiff could have had the identical gold in case he paid for it. Besides the fact that the transaction shows that he never intended or expected to have any gold actually, it is enough to say, quoting again the language of the court in 19 N. Y. 170, and substituting “gold” for “shares,” that “the plaintiff had no interest in having his shares kept separate from the mass of defendant’s stock. One share was precisely equal to every other share. Chancellor Kent said, in a case precisely similar in principle, that it was sufficient if the defendant always had the requisite quantity of shares on hand, and that the law would presume that the shares so on hand from time to time were the shares deposited, because the parties had not reduced them to any more certainty.” *Nourse v. Prime*, 4 Johns. Ch. 490. See also 7 Johns. Ch. 69.

But it is finally said that the plaintiff knew nothing about Lockwood & Co., who made these purchases in their own name; that they made the purchases on account of Keys & Co.; that Keys & Co. had in fact no control over the gold, and that, therefore, the contract was not executed according to its terms.

The plaintiff knew that the gold was not to be bought

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here, but in New York, where it was to be kept for the purposes of the contract. Both Keys & Co. and Lockwood & Co. are shown to have been at the time abundantly solvent. In the business of the defendants, it was proved that they always employed a subagent in New York to execute their orders. This was the usual course of business here, with full knowledge of which the plaintiff is chargeable. In fact, the purchases made by Lockwood & Co. were purchases made by the defendants; and the evidence showed that Keys & Co. could have had the amount of gold at any time, when the plaintiff upon paying for it might have desired it.

In general, an agent has no right to delegate his authority to a subagent without the assent of his principal. But where, from the nature of the agency, a subagent must necessarily be employed, the assent of the principal is implied. *The Dorchester and Milton Bank v. The New England Bank*, 1 Cush. 177.

Still more, where it is understood, as here, by both parties to be the mode in which the business would or might be transacted. Story on Agency, sec. 14.

Judgment affirmed.

[Leave to file a petition in error in the Supreme Court refused.—Eds.]

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HENRY L. DAVIS v. THE WESTERN UNION TELEGRAPH CO.

A telegraph company is bound to transmit to their destination all messages in the order of time they are received.

When dispatches are willfully delayed in their transmission, and a preference is given to one individual over another, whereby he receives damage, the court will not limit the damages he may recover against the telegraph company to the technical loss he has sustained, but rather award him a liberal compensation for the injury.

This case was reserved from Special Term upon the defendant's motion for a new trial, the verdict below having been there rendered for the plaintiff.

The petition alleges that the plaintiff was engaged in Cincinnati as a commercial news agent, and in furnishing to bankers, brokers in that city, reports in regard to public securities, gold, currency, stocks, bonds, and merchandise, which reports the plaintiff received from his agents in New York City, and was enabled to deliver and did deliver to his customers in advance of information received in Cincinnati by other parties and from other sources. That he was accustomed to receive, and did receive, his reports from New York over the wires and lines of the defendant, who was and is an incorporated company under the laws of Ohio, having offices both in New York and Cincinnati. That on the 17th day of April, 1867, the defendant received in New York from the plaintiff's agent a dispatch in writing, properly prepared for transmission, in accordance with the rules of said company, which dispatch the defendant then undertook promptly, and in due course of business and without partiality or favor to other persons, to deliver to the plaintiff, at Cincinnati, for the usual price demanded for the conveyance of said dispatches. That the defendant, wrongfully and maliciously intending to injure the plaintiff in his business aforesaid, purposely delayed and hindered the sending and delivery of said dispatch, giving unlawful and improper precedence to another dispatch of a rival commercial news agency, known as the Commercial News Department, which was received by the defendant after the delivery of the plaintiff's dispatch, but was wrongfully forwarded and sent by the defendant to Cincinnati, and made public in advance of the plaintiff's dispatch, thus delayed and held back.

The plaintiff further alleged that on the 19th day of April, 1865, the defendant, in furtherance of their unlawful purpose, issued an order to its operatives and subordinates

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as follows: "To all officers: When the letters C. W. D. are used, all operations must give way, as that business must have preference in everything."

It is further alleged the letters "C. W. D.," in said order, were intended to denote the dispatches of a rival agency in the same business with the plaintiff, and in which, it is charged, certain officers of the Western Union Telegraph Company were interested, and given an unlawful advantage and precedence in the transmission of commercial news dispatches over the defendant's lines, in violation of the plaintiff's rights in the premises; and which order was enforced against the plaintiff, whereby the dispatches sent to him were interrupted and otherwise hindered in their transmission, whereby he suffered great loss. The petition contained nineteen other causes of action, founded on similar delinquencies on the part of the defendant, ten of which were found to have arisen since the suit was brought, and were, therefore, stricken from the record by the court. Nine of the causes of action, however, including the period of time between April 17 and May 21, 1867, alike in substance to that stated in the first count, still remained, and were set down for trial.

A general denial was made, in the answer of the defendant, of all neglect of duty; that no preference was given to other companies or individuals, and insisting that the plaintiff enjoyed all his rights in the transmission of telegrams.

On the trial at Special Term, the jury found three thousand dollars damages for the plaintiff.

*Corwine & Corwine*, for plaintiff.

*Collins & Herron*, contra.

STORER, J. We are now asked, as the whole evidence is embraced in the record, to grant a new trial. No complaint is made of the charge of the court to the jury; the



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only question urged is that the damages are excessive. It is admitted by counsel that the testimony, although conflicting, was fairly left to the jury, and as it was their province to reconcile it, the court may well suppose they performed that duty impartially; indeed, we can not well conceive of a case where the sound discretion confided to the jury was more fully required to be exercised.

We have examined the bill of exceptions, and are satisfied the weight of the evidence was in favor of the plaintiff. The jury, it is said, should not have awarded more damages than the plaintiff could prove he had sustained; and the amount, it is claimed, could not, on the best estimation, be made to exceed \$450. This sum, it is claimed, could not be increased by a computation of losses not clearly the immediate result of the defendant's misconduct. We admit, as a general rule, that the measure of damages for a breach of contract is the amount of loss really sustained by the injured party, but in the application of this rule a liberal course may be pursued whenever the violation of an agreement is proved to have been willful or causeless on the part of the defendant.

In the case before us, it is in evidence that the plaintiff's business was not only affected so far as the direct injury he sustained by the neglect to forward the dispatches of his agent from New York to Cincinnati, but his business was finally broken up by the constant irregularities of the telegrams he ought in good faith to have received. And it is very evident the formation of a company, composed of the officers and stockholders of the telegraph company, whose object was to transact the same business in which the plaintiff had been previously engaged, gave to the defendant every facility successfully to compete with the plaintiff, as they had the control of their wires, and could prescribe, as they did, the rule by which their subordinates were to be governed, which appears, to use the language of the superintendent's order, at all times to

give the precedence to those dispatches on which a private mark was affixed.

It is evident that the mere allowance of the amount of loss the plaintiff proved he actually sustained, would not, in justice, remunerate him for the violation by the defendant of its agreement, and the jury might very properly have given an additional sum. This, then, may have been in positive evidence to establish the real damages the plaintiff might have suffered.

The duty of a telegraph company, in the receipt and transmission of dispatches, requires promptitude, impartiality, and good faith on its part. There can not be any preference permitted, or special favors granted, to any of those who may offer their dispatches for transmission; all are entitled to the same privileges, subject only to priority in time. He who first presents himself is to be first served. On any other theory, a telegraph company may become a perfect monopoly for favored parties; and, what is worse, a close corporation merely, for the benefit of the few to the prejudice of the many.

While holding this view of what the jury might have properly done, and what is the law of the case, we are satisfied the verdict was greatly in excess of the damages the plaintiff really sustained. We think there should be a remitter of \$2,000 from the verdict; and if that is assented to by the plaintiff, judgment will be rendered for the residue; if not, a new trial will be granted at defendant's costs.

Remitter assented to, and judgment entered on verdict.

J. W. POST AND THOMAS B. WILSON, Plaintiffs, in Error, v.  
C. W. GAZLAY, Defendant in Error.

When depositions or other written evidence have been offered and read to the jury, it is error in the court to hold that such evidence shall not be taken by the jury with them on their retirement.

Whatever may have been the practice in other States, or in England, it always has been the admitted right of the jury in Ohio, at least in the southern part of the State, to examine, on their retirement, all such evidence as may have been read to them.

ERROR TO SPECIAL TERM.—The facts appear in the opinion of the court.

*Tilden, Stevenson & Goodman*, for plaintiffs in error.

*W. M. Ramsey*, contra.

STORER, J. The case was submitted on the petition in error of Post and Wilson. The defendant in error brought this action, in Special Term, to recover for his services as an attorney at law, and on the trial the depositions of Post and Wilson were read and relied on to sustain their defense. A verdict was rendered for Gazlay, and a motion for a new trial was made and overruled. This court is asked to reverse this judgment on several grounds, all of which, except one, the court has had no difficulty in deciding in favor of the defendant in error. It is stated in the bill of exceptions that the depositions of Post and Wilson, though read to the jury without objection, were, on the motion of Gazlay, withheld from the jury by the order of the judge who tried the case. This order was excepted to, and the question is now directly presented whether the depositions were legally excluded.

They had been read and commented on by counsel, and professed to contain a statement of the facts upon which the defense was attempted to be sustained. No objection

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had been urged to their admission, either for irregularity in their caption or competency on the part of the deponents; nor does there appear to be any portion of the testimony excepted to on the trial as irrelevant. No reason is assigned for the withdrawal of the evidence, and the court is led to conclude it must have been solely on the ground that has sometimes been lately urged, that the jury have no right to take with them the written testimony of witnesses, but must rely on what they have heard read to them, no matter how hastily, by counsel, trusting alone to his accent, his emphasis, or his cadence, and without regard to his neglect of punctuation, as well as possible omissions of important facts; all this, too, when the argument of counsel, whether in the opening or closing of the case, may have claimed one version of the testimony, which is denied by the other to exist, or is modified and limited by his opponent.

The idea of withdrawing depositions from the jury is a modern one in the practice of our courts. For more than half a century one member of this court has been conversant with the practice in all our judicial tribunals, and he has never known the question mooted until now. No case, it is believed, can be found where the point has been so adjudicated in this portion of the State.

The Supreme Court, however, has settled the point in 2 O. S. 592, *Stites v. McKibben*, where it is well observed by Judge Ranney, "That having possession of the depositions enables the jury to refresh their recollection of the testimony without the least danger of being misled, and at once settles all differences among them as to what the testimony actually was." This adjudication is decisive, though the power of the court could not be doubted as to the exercise of their discretion to withdraw the entire depositions from the jury, where the depositions contain irrelevant or incompetent evidence, which might confuse the minds of the jury, without the ability on their part to separate the legal from the illegal statements of the wit-

nesses. Judge Ranney takes it for granted that in the English courts depositions are not allowed to go to the jury, but he does not refer to any reported case.

In *Taylor v. Webb*, reported in 21 Vin. Ab. 449, as far back as 1653, a new trial was granted on the ground that depositions were allowed to go to the jury, some of which had not been read on the trial. So in Tidd's Practice, it is said, "The jury will not be allowed to take with them any evidence which was not shown to the court." As far back as the case of *Vicary v. Farthing*, Cro. Eliz. 411, it was held that writings or books not under seal can not be sent to the jury without consent of parties. But it was, notwithstanding, admitted that a church book, read on trial to prove the non-age of the plaintiff, might be given to the jury.

The American courts have not always sustained the English rule on this question. Judge Washington, in *Lonsdale v. Brown*, 4 Wash. C. C. 149, allowed depositions that were read to the jury to be taken by them in their retirement, and does not intimate an objection to the propriety of such a course. So the Supreme Court of Massachusetts decided, in *Hix v. Drury*, 5 Pick. 301; and in *Taylor v. Sorsby*, Walker's Miss. Rep. 97, the same rule is recognized. Such is the general practice of the courts in our sister States and of the United States. It is founded upon the soundest principles, and has already prevailed in this portion of Ohio as the admitted law.

To forbid the inspection of written testimony by those who are to decide on the merits of the controversy, and to compel them to depend on their memory for what had been read to them, seems to the court not only dangerous, but in the highest degree exceptionable, and they ought not to permit such an invasion upon the long established rule. The judgment in Special Term must be reversed, and the case remanded for further proceedings.

Judgment reversed.

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Harris & Co. v. Trimble.

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N. HARRIS & Co., Plaintiffs in Error, v. THEODORE TRIMBLE,  
Defendant in Error.

The United States revenue act, passed June 30, 1864, and amended July 13, 1866, does not invalidate an unstamped instrument as evidence in a State court, where the circumstances of the case relieve the party suing thereon from the presumption that he intended to evade the internal revenue law.

IN GENERAL TERM ON ERROR.—The defendant in error sued to recover \$622, wages for four months in 1868. The original petition states that the written contract of hiring had been left with the plaintiffs in error when it was made and executed, and was withheld by them; but the defendant in error states that it contained an agreement that the defendant in error should serve the plaintiffs in error in the capacity of a manufacturer of tobacco for one year, and that the plaintiff in error should pay him therefor \$1,800; that he entered the service and performed his duty faithfully till July 11, 1868, when the plaintiffs in error, without cause, refused to let him proceed with the work and discharged him, and refused to pay him, to his damage, \$622.80. The petition was filed November 21, 1868.

The plaintiffs in error set up a suit in common pleas, which they allege contained the same subject-matter, and which is still pending. They also deny the indebtedness; deny that they know of any written contract, and deny its existence; aver that plaintiff was employed by defendant at a weekly salary of \$34.60, and so continued until July 12, 1868, when he was paid in full and discharged for incompetency.

Evidence on the part of the plaintiff below showed that there was a written contract for a year, though the defendants, Harris & Co., denied such contract, and since the

trial the defendants have found the written document and presented it with their application for a new trial, showing that it had not been stamped, as required, by the revenue laws of the United States.

*Geo. E. Pugh* and *Wm. H. Pugh*, for plaintiffs in error.

*S. A. Miller*, for defendant in error.

TAFT, J. The new trial is claimed on two grounds:

*First.* That the contract for the year, though in writing, was not valid, because not stamped; and,

*Second.* Because the verdict was against the evidence as to the discharge, being without cause.

The second question has been decided by the jury, and we do not feel at liberty to interfere with this decision.

As to the objection that the contract was not stamped, as appears by the instrument now produced, the case falls fairly within the case of *Harper v. Clark*, 17 O. S. 190, where it was held that "the revenue act of Congress, passed June 30, 1864, does not invalidate an unstamped instrument required by the act to be stamped, unless the stamp be omitted with intent to evade the provisions of the act."

The circumstances of this case relieved the plaintiff from any imputation of intention to evade the stamp act, as the document was in possession of the defendants, Harris & Co., and beyond the control of the plaintiff, who had reason to suppose that it had been duly stamped.

It is not necessary to go so far as the Supreme Judicial Court of Massachusetts went, in 97 Mass. 452, in which it was held that "the provision of the United States statute of 1866, chap. 184, sec. 9—that no instrument or document not duly stamped, as required by the internal revenue laws of the United States, shall be admitted or used in evidence

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in any court until the requisite stamps shall have been affixed thereto—applies only to the courts of the United States.”

No question has been raised upon the alleged pendency of the action in the common pleas, nor is there evidence to show the identity of the causes of action. As that action was brought before this action accrued, it is certain that there can not be a complete identity.

The record shows no sufficient ground to set aside the judgment, which is therefore affirmed.

[Leave to file a petition in error in the Supreme Court has been refused.—EDS.]

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MINERVA J. FLINN v. LEWIS D. MANNING.

A. was father-in-law of B., and associated with him as a partner in the practice of law, and while that relation existed, they acquired a house and lot by way of compensation for legal services rendered by the firm, the title of which was taken to A., but B. went into the possession. A. died, and his widow claimed the whole under the will; and B. also claimed the whole, viz: one-half on the ground that it had been paid for by the firm, and the other half by a verbal contract and transfer made by A. to B. while B. was in possession as tenant in common.

*Held*, that B., as tenant in common of an undivided half of the house and lot, could not acquire a title to the other half by a parol agreement with his co-tenant, there being no such part performance, by change of possession or otherwise, as to take the case out of the statute of frauds.

RESERVED FROM SPECIAL TERM.—This is a suit by Mrs. Flinn, widow and devisee of Judge Jacob Flinn, deceased, to recover a house and lot from Lewis D. Manning, who is in possession of it, claiming title. She alleges that the property belongs to her late husband, and by his will was conveyed to her.



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The defendant denies the title of the plaintiff, and also avers that the property was acquired from Fox and wife to Jacob Flinn, for legal services rendered and to be rendered in certain cases; that about that time the defendant became the partner in business of Flinn, and shared in the labor and responsibility of the business, and in consideration thereof Judge Flinn agreed that Manning should share with him equally in the ownership of the property; that the defendant went into immediate possession of the property with the consent of Judge Flinn, and has remained in exclusive possession from that time, viz: 1861, to the present time; that the defendant also became the son-in-law of Judge Flinn by marrying his oldest daughter, and that sometime in 1865, Flinn gave him the other half of the property as his own. But no writings or title papers were executed.

Such are the general features of the case as shown by the pleadings. There are sundry minor circumstances in evidence. It is stated by several witnesses that Flinn said that the property belonged to Manning; that he regretted that Manning was not doing as well as he desired him to do, but that he, Flinn, had provided for him and his wife a home.

*Warden*, for plaintiff.

*Okey*, for defendant.

Taft, J. It is claimed by the plaintiff that Judge Flinn never actually gave the property to the defendant, though he permitted defendant and wife to occupy it. It is also claimed that, as Manning was in possession when this verbal transfer of the property, in 1865, is said to have been made, the statute of frauds is a complete bar to a recovery, within the principle of the cases of *Armstrong v. Kattenhorn*, 11 O. R. 265; *Crawford v. Wick*, 18 O. S. 190.

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By the statute of frauds a parol contract for an interest in real estate can not be enforced. But where there has been a part performance by a change of possession, in pursuance of such parol contract, a court of equity will interfere and enforce the performance of the contract, to prevent what would be a fraud in the party who seeks to escape such a contract.

The principle of the cases cited, viz: *Armstrong v. Kattenhorn*, *Crawford v. Wick*, is that where the party who makes a parol contract for land is already in possession, the rule can not apply, and the statute of frauds operates to prevent the enforcement of the contract.

As Manning was in possession of an undivided half of this property, by the sufferance of Flinn, in 1865, when it is claimed that Manning, by a parol contract with Flinn, acquired title to that half, we think that the principle of the case of *Armstrong v. Kattenhorn* applies, and that this defense is valid as to that undivided half which the defendant claims to have acquired in 1865 by a parol contract.

The evidence satisfies us that Flinn and Manning were tenants in common in equity, however the title may stand on the record. From the evidence before us, as well as the uncontradicted statements contained in the elaborate briefs, we are satisfied that the plaintiff is entitled to a decree for an undivided half of the property, and that the defendant should be quieted in his title to the other undivided half; and that the costs of the suit and cross-suit should be paid equally by both.

## MICHAEL FISHER v. GEORGE GRAHAM.

An ordinance to grade and macadamize a street, passed by the city council under the municipal corporation act of 1862, upon the report and recommendation of the board of city improvements, was valid, although the report and recommendation were not signed by the clerk of that board.

This case was reserved for the purpose of determining the validity of an ordinance adopted by the city council, August 21, 1863, for grading and macadamizing Parker street. The objection to the ordinance is that its adoption was not recommended to the city council by the board of city improvements, and therefore the council had no power to act on the subject.

*J. Bevan, Jr., and Geo. E. Pugh, for plaintiff.*

*King, Thompson & Avery, for defendant.*

TAFT, J. The question to be determined in the case, is whether the council did, in this case, order this improvement on the report and recommendation of the board of city improvements.

It appears that the board, on the 21st of August, 1863, adopted a resolution, "That the clerk prepare and transmit to the city council an ordinance to grade and macadamize Parker street, from Ohio avenue to North Elm street."

It appears that, on the same day, the city council took up the ordinance as coming from the board of city improvements, and passed it. The copy of the ordinance is in evidence as passed; it was adopted as coming from the board, and is precisely the ordinance which the board ordered the clerk to prepare and transmit to the council.

Are we to regard this ordinance as adopted without the report and recommendation of the board of city improve-

ments, or upon such report and recommendation? The proceedings of the council assume and represent that it was upon the recommendation of the board. The council did not originate the ordinance, but the board of city improvements did, as appears from the record of the proceedings of the city council in evidence. The same fact appears quite as clearly from the proceedings of the board. There is no reason to doubt that the ordinance was prepared and transmitted by the clerk as directed, and the council thus became possessed of it as shown by its proceedings.

But the clerk did not authenticate the ordinance by his signature. The document accompanying the proposed ordinance contained a recommendation of it, but was not signed. But the committee of the council knew from whom it came. Now, shall we presume, after all, that this ordinance was not recommended to the council?

There is nothing in this case to require the court to presume a fact involving a breach of duty on the part of the council and its committee, when the evidence is more consistent with the faithful performance of that duty.

In the opinion of the majority of the court, the effect of the evidence is that the ordinance was reported, and the recommendation was made, and on that report and recommendation the council acted. When the board directed their clerk to prepare and transmit to the council an ordinance to grade and macadamize the street, they directed him to do that which, if done, would amount to a report of the ordinance and a recommendation of its adoption. The intention to report and recommend was declared by the board in its proceedings, and as the proceedings of the board were recorded, and, by ordinance, required to be kept open to the inspection of the city council, as well as to the rest of the public, it was itself a recommendation; and if reported to the council by its clerk, and the council acted on it, the statute was substantially complied with. And when we find the council professing to act upon a recommendation which we know that the board had made,

we may safely take that profession to be true. There is no reason, that we can conceive of, for us to presume the contrary.

There is nothing in the case to induce the court to be more strict in its construction of the statute in this, than in other cases.

There is no evidence of any attempt to discard the preliminary action of the board of city improvements. That board had signified in the most unqualified manner, and in the manner which was usual, its recommendation of the improvement, and on that the council acted. The work has been done. The defendant has had the benefit of the improvement. The mere clerical omission of the clerk of the board to sign the document, transmitted probably by his own hand to the committee of the city council, is not such a substantial defect as to annul the proceedings for want of jurisdiction. The requisition of the statute was substantially complied with. It is not a condition precedent to the action of the council that the recommendation or the report shall be signed by the clerk of the board. The council are not to act "except on the report and recommendation" of the board. No form of report or recommendation is prescribed. The board by preparing and delivering the ordinance to the city council could intend nothing less than to report it and recommend its passage.

An ordinance was not void because it was not signed by the president of the council, if it were actually passed and recorded. (11 Ohio St. 101.) That was an ordinance for annexation, which was not signed by the president of the council. "Though it be true that the statute directs him to authenticate all ordinances by his signature, it does not follow that his signature is essential to its validity." (Ib. 103.)

The provision requiring that ordinances shall be authenticated by the signature of the presiding officer and clerk of the council is contained in section 100 of the municipal

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code, page 34, being the same provision contained in the act of May 3, 1852, section 102, Disney's Ord. 195, 184.

There is a recognized distinction between a case like this and those cases in which private property is condemned for public use. The effect of setting aside these proceedings is to relieve the defendant from his just share of the costs of a local improvement to his property, and cast it upon the other tax payers of the city. This we are not willing to do unless upon substantial grounds. A mere clerical defect in the evidence on which the council acted, when the substantial thing existed which the statute required, does not warrant a denial of their jurisdiction in the case.

A majority of the court are of the opinion that the ordinance was valid, and that the plaintiff is entitled to a judgment for the amount of the assessment.

STOREE, J., dissented, and gave the following opinion:

This case is reserved from Special Term for the opinion of the judges upon the following questions:

*First.* Was an ordinance of the city council of Cincinnati a valid exercise of power on the part of that body to authorize the improvement of a street at the expense of the adjoining land owners, unless the mode of assessment, whether it shall be by front foot or otherwise, is first prescribed?

*Second.* Is there any legal evidence in the case that the ordinance was passed by the council upon the recommendation and approval of the board of city improvements?

We need not now examine the proposition first stated, as we have determined in another case while this action has been pending, that there was a general ordinance of the council in force when the proceedings in this cause were had, which prescribed the mode of all assessments, declaring that when the price to be paid for the contemplated improvement was not specially assessed upon the

adjoining property, it nevertheless was to be regarded as assessed upon it by the front foot.

The only question, therefore, we are now to determine is, can the city council direct a public improvement to be made, and the cost assessed upon the adjoining lot owners, unless the work has previously been recommended to be done by the board of public improvements? This involves the proper construction of the city charter, and the ordinances that are in force which confer the power upon that board and prescribe its duties.

Three commissioners, one of whom is elected annually, with the mayor of the city and the city civil engineer, constitute this board; and by section 60 of the charter (Disney, 107), it is declared, "that in all cities of the first class, where there shall be a board of city improvements, no improvement or repair in relation to streets, sewers, or bridges shall be ordered or directed by the city council, except on the report and recommendation of the said board; they shall report from time to time to the council when any such improvements and repairs are necessary or proper, and when an assessment is required and the proper amount to be assessed, and the council shall take such action thereon as may be deemed proper."

By the same statute, the city council were authorized to prescribe additional duties to be performed by the board; and on the 17th March, 1865 (Disney, 265), an ordinance was accordingly passed, defining the duties and powers of the board, which "gave them full power and control over the streets, lanes, and alleys of the city, requiring all applications for the establishment of grades or the change of grades, or the grading, paving, repairing, or improvement of the public thoroughfares, to be made to them, who were then required to investigate and determine the propriety of the proposed improvement, causing an estimate of the probable cost to be made by the city civil engineer, a copy of which shall be placed on file in their office."

They were further empowered, if no petition was pre-

sented, should they be satisfied the work is proper to be done or the improvements made, after they have caused an estimate of the cost to be calculated by the city engineer, to present the subject to the city council for their consideration. By section 5 of this ordinance the clerk of the board "is required to prepare all ordinances and resolutions which shall be submitted to the council, and his certificate should be proof of the action of the board on the subject.

It is matter of municipal history that before the establishment of the board of city improvements, the duties now devolved upon its members were performed by committees of the council, who examined the propriety of the proposed improvement and reported to the corporate body, what is now required to be done by the board of improvements. This imposed much labor upon the members of the council, who could not be expected to devote the time necessary to a minute examination of the subject when it interfered with their ordinary pursuits. Consequently, there was not unfrequently hasty legislation, which produced, unintentionally, great injury to property, and imposed heavy burdens upon its owners. This necessitated the organization of the board of city improvements, to whom was properly confided the important duty of examining, estimating, and carefully judging the work to be done; and its cost, as well as its necessity, were to be considered preparatory to the final action of the council. The introduction of this new agency into our municipal government was intended also as a check on the council, and became a virtual restraint on their ordinary powers; and while it gave this board the authority to recommend what should be done, it imposed upon it the responsibility of carefully and thoroughly investigating the subject.

The council, then, it is clear to us, should not act until they have first been informed by the board that their action is necessary, and the projected improvements proper to be made. The recommendation thus required to be made by



the charter gave jurisdiction over the subject to the council and justified them in ordering the work to be done, while it protected individuals from injudicious, if not oppressive taxation.

We suppose, in all cases like this, the action of the council is legislative and not judicial, and therefore nothing can be inferred to sustain it, but, on the contrary, every step required by the charter to confer the power must be proved. This was held in *Culbertson v. City of Cincinnati*, 16 Ohio, 574; *McMicken v. Same*, 4 Ohio St. 394.

In *Harbeck v. City of Toledo*, 11 Ohio St. 219, the question is fully examined by Judge Peck, who decided that the power conferred on municipal corporations to take private property for public use must be strictly followed, and when the statute giving the authority requires the publication of a notice, preparatory to the appropriation, which requirement was not complied with, the appropriation could not be sustained. He quotes, among other cases, *The State v. Jersey City*, 1 Dutcher, 310, and *Bonaparte v. Camden and Amboy Railroad*, 1 Baldwin, 229, in both of which it is said that the authority given to the corporate body must be strictly pursued, "as it is special, limited, and conditional." This decision is founded upon the assumption that the jurisdiction conferred can not be sustained by implication; it must have been first acquired before it can be legally exercised, and such also was the opinion of the court in *Adams' Lessees v. Jeffries*, 12 Ohio, 253, where the question was carefully investigated by Judge Lane.

The right to adjudicate must appear before the jurisdiction attaches; while it is always the privilege of the defendant to deny it, or show that it did not legally exist. We find the rule vindicated to its largest extent by Judge Bronson in *Sharp v. Johnson*, 4 Hill, 93, where the subject is treated with great clearness and ability; but upon so plain a question it is needless to multiply authorities.

Before the organization of the board of city improvements, there was a time in our municipal history when the consent

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of a majority of the lot owners bounding on a public street was required to authorize its improvement, and it was always regarded that no power existed in the council to order the work to be done unless that provision was first complied with. Indeed, such power was never otherwise exercised, and it would seem that the recommendation of the board has been now substituted, and was intended to protect the property holder as well as to confer jurisdiction upon the council.

We have been furnished with certified copies of the proceedings of the council in the case before us, and it does not appear that the board of city improvements took the preparatory steps required by the charter, nor recommended the improvement to be made for which the defendant is assessed. On the contrary, the ordinance seems to have been passed by the sole action of the council, as if it had originally been presented on the motion of one of its members. This may have been an oversight, but the fact should substantially appear on the record that what gave jurisdiction to the council really existed, and was before that body when the ordinance was passed. This is not found in the proceedings, and can not be inferred from the passage of the ordinance.

We but state the rule that in the proceedings of any tribunal whose jurisdiction is limited, the power assumed must be shown to exist, and conclude, therefore, the ordinance before us is *ultra vires*, and the defendant can not be charged with the assessment made on his property.

**J. BRYANT WALKER**, Solicitor of the City of Cincinnati, and a tax-payer of said city, Plaintiff, *v.* **THE CITY OF CINCINNATI**, **CHAS. H. TITUS**, Auditor, and **WILLIAM HOOPER**, **MILES GREENWOOD**, **RICHARD M. BISHOP**, **PHILIP HEIDELBACH**, and **E. A. FERGUSON**, Trustees of the Cincinnati Southern Railway, Defendants.

The act of the legislature of Ohio, passed May 4, 1869, authorizing any city of the first class, having a population exceeding one hundred and fifty thousand inhabitants, to construct a railroad terminating in and essential to the interests of such city, and to borrow as a fund for that purpose a sum of money not exceeding ten millions of dollars, is not a violation of section 6, article 8, of the present constitution of the State of Ohio, which provides, "That the general assembly shall never authorize any county, city, town, or township, by a vote of the citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever, or to raise money for, or loan its credit to, or in aid of, any such company, corporation, or association."

The said act, and the act of March 25, 1870, supplementary thereto, are constitutional and valid.

**RESERVED FROM SPECIAL TERM.**—This suit is brought for an injunction against the city and the trustees of the Cincinnati Southern Railway. The petition recites the act of the legislature, passed May 4, 1869, to authorize the appointment of trustees and the construction of the road, and the issuing of bonds of the city to the amount of ten million dollars for that purpose; alleges the appointment of the trustees under the act, and recites the proceedings of this court, as recorded, in relation to said appointment, stating that the trustees have organized and obtained an office, that they have procured the consent of the legislature of Tennessee to build the road through that State, and applied to the legislature of Kentucky for a like consent; that the Ohio legislature have passed another act, of March 25, 1870, supplementary to that of May 4, 1869, authorizing the city to advance fifty thousand dollars to the trustees for the purpose

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of carrying into effect the object of their appointment, to be repaid out of the bonds to be re-issued under the original act; that the auditor has appropriated a portion of said fund, and there remains a part unappropriated; that the acts above mentioned are unconstitutional and void, and the advance of this money a misapplication of the public funds and not a proper corporate use, and asking an injunction.

The defendants have demurred.

*Walker & Conner*, for plaintiff.

*E. A. Ferguson*, for defendants.

TAFT, J. We have presented for our consideration the constitutionality of those acts by which the city of Cincinnati has been authorized to construct the Southern Railroad, and to expend money preliminary to its construction by surveys and other preparations for the work.

That the legislature regarded the road as a matter of public concern to the city, and a proper work to be carried through by taxation on city property, is shown by the enactment of the law authorizing the issue of the bonds to build it, and the levy of the tax to pay the interest thereon; and that the people of Cincinnati entertain a like opinion is also evinced by the popular vote, as well as by the proceedings of the legislative body of the city.

The importance of this project as a Cincinnati project, and its public character as a subject of taxation, are questions, therefore, which have already been decided by those most deeply concerned, and by those who have been especially and primarily intrusted with their decision; and it would require a clear case against the opinions of the city and State legislatures, thus unequivocally expressed, to justify the court in contradicting them in its finding on this point.

It has been held by our Supreme Court that the con-

struction of a railroad might be a proper subject for the taxation of a municipal corporation, independent of and prior to the restrictions in our present constitution, and the issue of bonds and the levy of taxes to pay the interest on them was enforced by a writ of mandamus since the constitution of 1851 was adopted, the act under which the subscription was made having been passed prior to the change in the constitution. If the construction of a railroad had been a purpose beyond the scope of municipal taxation, the restriction in the new constitution upon the power of a city to lend its credit, or otherwise assist a private corporation in its construction, would not have been required.

The form in which such aid was granted usually was by lending bonds or money to the corporation which was constructing it, or by subscribing to its capital stock. The railroad company was a private corporation and operated its roads for its own profit, but the public derived large incidental advantages from its use. In this State it has been several times decided, that a municipal corporation had an interest in such a work to justify a municipal tax to aid in carrying it through. (2 Ohio St. 607, 647, 649; 14 Ohio St. 472, 479.)

If, then, the restriction in the present constitution against the aiding or subscribing to the stock of railroad companies by towns, cities, and counties had been omitted, the legislature might have authorized such aid to railroad corporations. (*Cass v. Dillon*, 2 Ohio St. 608; *Cincinnati, Wilmington and Zanesville Railroad Company v. Commissioners of Clinton County*, 1 Ohio St. 77; *Fosdick v. Village of Perrysburg*, 14 Ohio St. 473.)

It evidently follows, from these repeated adjudications, that if the legislature, under the old constitution, instead of authorizing municipal corporations to aid private corporations in constructing railroads, by the issue of bonds, or subscription to the capital stock of such companies, had authorized a city itself to construct a railroad deemed of

public importance to such city, and indispensable to its welfare, it would have been constitutional. The same reason would have justified both methods of securing the same object.

It would have been at least as constitutional to have authorized the city to build the road, as to have authorized it to loan money to a private corporation in order that it might build it. By the latter plan, the accomplishment of a public purpose, through the application of the public funds, was left dependent upon the good faith and discretion of a private corporation, whose legitimate object was profit to its individual stockholders. This has long been regarded as objectionable.

The restriction in the present constitution which is supposed to prohibit the act authorizing the city of Cincinnati to build its Southern Railroad, is contained in the sixth section of the eighth article, which provides, "That the general assembly shall never authorize any county, city, town, or township, by a vote of the citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever, or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association."

This restriction plainly cuts off the power to authorize cities to loan their credit to railroad companies or take stock in them. The power to authorize the city itself to construct such an improvement, however, is not mentioned.

By the fourth section of the same article, it is provided that "the credit of the State shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation whatever, nor shall the State ever hereafter become a joint owner or stockholder in any company or association in this State or elsewhere, formed for any purpose whatever."

Prior to the adoption of the constitution, "it was competent for the legislature, under the constitution of 1802, to construct works of improvement on behalf of the State,"

as it did the Ohio canal, "or to aid in their construction, by subscribing to the capital stock of a corporation for that purpose," as it did in the case of the Cincinnati and Whitewater Canal Company, "and to levy taxes to raise the means, or by an exercise of the same power to authorize a county or township to subscribe to a work of that character running through or into such county or township, and to levy a tax to pay the subscription," as was held in the case of *C. W. & Z. R. R. Co. v. Clinton County*, 1 Ohio St. 77, and *S. & I. R. R. Co. v. North Township*, 1 Ohio St. 105; also several other cases, as 1 Ohio St. 153; 2 Ohio St. 608; 7 Ohio St. 327; 8 Ohio St. 394; 14 Ohio St. 482, 479, and still in other cases which need not be cited, but which leave no doubt on this question in the State of Ohio.

Nothing can be clearer than that this restriction upon the State is limited to its loaning its credit to companies or corporations, and to its "becoming a stockholder in any company." It can not be contended that the provision intended to prohibit the State itself from accomplishing directly "any purpose whatever." The extent of the restriction is that the State shall neither lend its funds to, nor become a member of, a private corporation for any purpose whatever. Its power to make necessary public improvements without the agency of corporations remains as it was before; and what it was before we have seen was not doubtful.

We feel bound to give a like construction to the sixth section, which applies to cities.

They can not be authorized now, as formerly, to lend their funds or their credit to, or to become members of trading corporations for any purpose whatever. But they can be authorized to expend their own funds in making necessary public improvements in the same manner, and to the same extent, as before the adoption of our present constitution.

In our opinion, it follows logically and unavoidably from the decisions of our own State, and indeed from the cur-

rent of authorities in other States, that these acts are constitutional. Upon a careful examination of our present constitution, and a comparison of it with the constitution of 1802 and the adjudications of our courts under it, the case appears to our minds clear of doubt.

If, however, the case were doubtful, we should not be justified in pronouncing the acts of the legislature void. The presumption must always be in favor of the validity of the laws enacted by the State legislature, if the contrary is not clearly demonstrated.

The incompatibility must be clear to warrant the setting aside of an act of the legislature duly passed. (*C. W. and Z. R. R. v. Commissioners of Clinton County*, 1 Ohio St. 77; *Lehman v. McBride*, 15 Ohio St. 591; 10 Ohio, 235; 11 Ohio St. 641.)

In *Lehman v. McBride*, our Supreme Court declared "that while it was the right and the duty of the judicial tribunals to give full force and effect to the organic law of the State, and, therefore, to declare null and void any attempted acts of legislation which contravene the limitations imposed by the constitution upon legislative power, yet such judicial interference can not be justified in doubtful cases."

Such is the uniform current of judicial authority. Mr. Cooley, in his work on Constitutional Limitations, 87, 88, lays down the same rule.

It was said in the case of *Sharpless v. Philadelphia*, 21 Penn. St. R. 164, which arose from an attempt to resist a tax levied to pay a railroad subscription, that an act resting in the discretion of the legislature will be pronounced void, "only when it violates the constitution, palpably, plainly, and in such a manner as to leave no doubt or hesitation in our minds."

And in *Cheney v. Hooser*, 9 B. Mon. 345, the court declared that a "tax must be considered valid, unless it be for a purpose in which the community taxed has palpably no interest."



We are not at liberty to use our judgment as to what is judicious for the State to enact, or for the people of the city to vote. Can we assume judicially that the people of this city have no interest in the Southern Railroad, contrary to the solemn act of the legislature, whose duty it was to pass on this very question, and contrary to the vote of the people? Is this a case in which we can hold that the State legislature has clearly gone beyond its authority? We think not.

The objection has been suggested that the Southern Railroad is to extend a great distance from Cincinnati, and beyond the limits of the State of Ohio. The objection is plausible. But power has often been granted to cities to operate beyond their corporate limits in order to secure something essential to their welfare. The city of New York was authorized to bring the water of the Croton river a distance of forty miles, at the cost of \$11,000,000; nor can we suppose that the exercise of such authority for such a purpose would have been prevented if the Croton aqueduct had crossed the line of a State.

Cincinnati has, in several instances, exercised authority granted by the legislature to make costly improvements beyond the corporate limits. The House of Refuge was built under such a law. The Infirmary was beyond the limits, also the Work-house.

The city was authorized to expend funds in the purchase of stone coal in the mines which are not located within the corporation, but in different States, "and in all the necessary agencies for the procuring, transporting, and delivery of said coal" to the city, for the purpose of protecting the citizens against exorbitant prices in the times of scarcity.

Cincinnati, under a law of the legislature, loaned to the Ohio and Mississippi Railroad Company, whose improvement lay principally beyond and outside of the State of Ohio, a large sum of money, and afterwards exchanged its bonds for the stock of the company.

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Under a like law of the legislature, the city of Cincinnati has already invested \$150,000 in the railroad from Cincinnati to Lexington, in the same general direction as that contemplated for the Southern Railroad, and altogether outside the State of Ohio.

If there were a lake of good water on the south side of the Ohio river, and if the legislature and the city itself were of the opinion that the welfare of the city required that an aqueduct should be constructed by the city to draw pure and wholesome water from that source, and the proper legislation were had in Ohio and Kentucky, it can not be doubted that the city could raise the money by taxes, under the authority of such legislation, to do the work.

The fact that it is expected that the Southern Railroad will extend beyond the State line a much longer distance, or that it is not water which is to be drawn by it to Cincinnati, does not change the principle. We do not say that this principle could not be so abused as to require the interposition of the judiciary to restrain it. But we have no evidence on which we can so find in the present case.

The opinion of Judge Cooley in the case of *The People v. Salem*, in the Supreme Court of Michigan, is not inconsistent with the decision we now make. That opinion decided that the levy of a tax to raise money to give to a railroad company, either by loan, or by subscription to the capital stock, to help construct its road, is not a proper use for the taxing power, because it is giving the public fund to a private corporation. (9 Am. Law Reg. 487.)

It has no application to a case where the municipal corporation itself constructs a public work essential to its own welfare, as the learned judge has himself declared in an opinion published since that decision, in which he says, "that the power of cities in Ohio to construct works of internal improvement, with legislative permission, has been settled by judicial decision," and "that there is nothing in the present constitution of Ohio designed to prevent the local authorities from levying taxes for the construction of

railroads where their own agencies are employed for the work." Indeed, the opinion coincides entirely with that which we have expressed. Nor is the case of *Whiting v. The Sheboygan Railroad Company*, in the Supreme Court of Wisconsin, as published in 9 Am. Law Reg. 156, in conflict with our opinion as now announced.

In that case, Dixon, Judge, giving the opinion of the court, held that a municipal corporation could not, under the constitution of that State, loan its funds to a railroad corporation, although he expressed the opinion that it might subscribe to the capital stock of the company, because it became to that extent owner of the improvement, and such ownership made it public property.

It is not necessary that we should consider any such distinction. But we may add that we have found no authority, and have been referred to none, inconsistent with the principles we have expressed.

Upon the whole case, we hold that "the act relating to cities of the first class, having a population exceeding one hundred and fifty thousand inhabitants," passed May 4, 1869, and the act of March 25, 1870, supplementary thereto both of which are recited in the petition, are constitutional and valid—in which opinion we are unanimous.

STORER, J. It might be supposed, in a case of so much importance, that each of the judges would announce an opinion; but Judge Taft had so exhausted the subject, and given the individual views of his associates so fully, combining them with his own, that it is scarcely necessary they should do more than subscribe to his opinion.

There was one idea, however, it might be proper to refer to here, by the way of illustration, as it was suggested when the case was before the judges in the consultation room. Suppose it was necessary to build a bridge across the Ohio river at this point, could not the legislature authorize the city of Cincinnati to build it, provided the State of Kentucky would permit the abutments on that side to

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be put up? It did not appear to the court there could be any doubt on that point.

HAGANS, J. The present case has been under advisement with the General Term since the month of October; the whole subject has been most carefully considered, in view of the magnitude and importance of the questions involved, as well as the discussion of them that has been had, not only before the court but elsewhere. The result reached is entirely satisfactory to each member of the court.

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GEORGE E. DONNER ET AL., Plaintiffs, v. THE DAYTON AND CINCINNATI RAILROAD COMPANY, Defendant.

A railroad company, chartered by special act of the legislature, empowering the directors, among other things, to transact all the business of the company and to sell and convey real and personal estate, and the right to complete any part of the road and put it in operation which the interests of the road may require, and having a choice of several routes and termini, may sell and convey to a competent vendee a portion of its right of way upon which no work has been done for a money consideration, and in satisfaction of its mortgage indebtedness on its whole line leaving to its creditors the part of its road-bed, upon which the bulk of its means has been expended.

Such a sale and conveyance are not *ultra vires*, and the corporation is not thereby destroyed.

The vendee of this right of way having acquired and enjoyed all its benefits shall not afterward be allowed to foreclose the mortgage, though he still holds the bonds which the vendor is entitled to have canceled.

The mere fact that the property of the corporation was in the hands of a receiver at the time of the sale, can not affect the transaction if *bona fide*.

RESERVED FROM SPECIAL TERM.—In February, 1847, 1848, and 1849, the legislature passed several acts by which the Dayton and Cincinnati Railroad Company became incorporated. It was known generally as "The Short Line Railroad," and is so designated. It had power to construct a

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road from Dayton to Cincinnati, though in the first two acts it was called by other names, and was authorized to construct roads with different routes and termini. The board of directors was made "competent to transact all the business of the corporation," and to issue and sell bonds, etc., and made capable "to have, purchase, receive, possess, sell, convey, and enjoy real and personal estate," etc., and the right to complete any part of the road and put it in operation which the interests of the road may require to be first completed.

The company was duly organized, located its road, and commenced work in 1852, and in April, 1853, a mortgage upon the entire line from Dayton to Cincinnati for \$1,000,000 was made to Wm. J. McAlpin and Peter Odlin, trustees, to secure the bonds of the company to that amount, and seventy-two of them for \$1,000 each were sold or disposed of in the same year. It appeared that about \$700,000, obtained principally from stock subscriptions, had been expended within three miles of Cincinnati, chiefly on what is known as the Short Line Tunnel, and that this was about the whole expenditure of the company in the construction of the road.

The company became insolvent and unable to proceed with the work. Donner and others, plaintiffs, owned thirty-eight of the mortgage bonds of the company, and brought suit, in May, 1859, to foreclose the mortgage and obtain payment of these bonds, and on motion a receiver was appointed to take charge of the unfinished road and other property of the company, and the plaintiffs obtained judgment and execution in 1860 for nearly \$44,000. To the action sundry judgment and other creditors were made parties, who filed answers and cross-petitions, and, among other things, sought to subject unpaid stock subscriptions to the payment of their judgments.

In this state of affairs, the Cincinnati, Dayton and Eastern Railroad Company, known as the "Eastern Road" and so designated for convenience, became the owners by

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assignment from the plaintiffs and others, both of the judgment they had obtained and also of the bonds of the Short Line Company, upon which the judgment was founded, to the number of sixty-five, in all \$65,000, and accrued interest. Donner had no decree for sale at the time, but was pressing his claim in judgment against the Short Line Company, while other creditors by judgment to a large amount were doing the same, the company being utterly insolvent, as is alleged. It appears that on the 28th July, 1865, the Short Line Company, upon the previous action of the board of directors appointing two of the members of the board for that purpose, by written agreement and conveyance to the Eastern Company, reciting its ownership of the right of way it had acquired, and other rights for the side tracks, depots, stations, etc.; that it had been engaged at work chiefly near Cincinnati, where it had expended a large amount of money arising from stock subscriptions; that it had incurred liabilities for borrowed money, existing in part in its mortgage bonds, *secured on its entire road and property*; and that proceedings in foreclosure to sell the road were pending, and it had not the means or credit to complete the road, but was in imminent danger of having its *entire road sold* under the proceedings aforesaid, in consideration of \$55,000 cash received, and of further covenants, sold and conveyed all its right, title, and interest in and to so much of the right of way, road-bed and ground appropriated or intended for side tracks, depots, stations, and other appurtenances of the same, in its full length and breadth, as extends and is situate in and from the city of Dayton, in the county of Montgomery, to the town of Sharon, in the county of Hamilton, including all its said line and appurtenances, situate and lying between said termini in Dayton and Sharon; and also the right to locate, construct, maintain, and operate, for the exclusive and perpetual use of said party (the Eastern Company), its successors and assigns, a single or double track of rails on and along that part of the right

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of way and road-bed of the Short Line Company which extends from the town of Sharon to the point where said roadway intersects the road of the Marietta and Cincinnati Railroad Company. "It is expressly understood, nevertheless, by both parties to this indenture, that the same is not intended, or to be construed, to pass or include the capital stock of the Short Line Company, or any part thereof, whether paid or unpaid, or the franchises of the Short Line Company, or the residue of its right of way or its other property not hereinbefore granted, but the same are reserved and retained by the Short Line Company."

The agreement referred to in the indenture bears date the same day, and provides, in addition to the consideration of the \$55,000 cash paid as set forth in the deed above recited, that the Eastern Company shall keep the Short Line Company, in so far as regards the directors, stockholders, and all the franchises and property not included in that conveyance, harmless and indemnified against the payment, or liability to pay, or be made answerable upon, the mortgage bonds of the Short Line Company, and interest, whether in judgment or otherwise, then owned and held by the Eastern Company, to the amount of \$65,000, naming and numbering them; "It being understood that neither the said bonds, or the interest, or the coupons thereon, or the judgment rendered on them, or the mortgage by which they are secured, are in any manner paid or satisfied in whole or in part by this contract; but the same are to remain in full force, capable of being at any time made operative and available, either to protect and confirm by sale or otherwise the title" of the Eastern Company "to the right of way and appurtenances hereby sold, or in case of the failure of the title conveyed by said," the Short Line Company, "as herein stipulated, then to become fully operative against the said," the Short Line Company, "and all its property and franchises, in as full and ample a manner as if this contract had not been made." Upon the happening of the same contingency of

failure of title, the agreement provided for the repayment, or security therefor, of the \$55,000 paid as part consideration of the conveyance. The \$55,000 paid in money, it is alleged, were distributed among the creditors of the company.

Upon this security, the Eastern road, in November, 1866, issued mortgage bonds to the amount of \$2,000,000, few of which are outstanding, the balance having never been negotiated. But the Eastern Company shortly afterward turned over all its rights in the agreement and property conveyed to it by the Short Line Company to the Sandusky road, which, by reason thereof, as the testimony shows, has made a running arrangement at a considerable profit with the Cincinnati, Hamilton and Dayton Railroad Company, which is operating a line of road from this city to Dayton by way of Hamilton, and, as may be supposed, the Eastern Company does not intend to do anything with the property it owns by virtue of this conveyance from the Short Line Company.

In this suit various entries were made and proceedings had, until in March, 1870, a decree for sale was entered in behalf of the Cincinnati, Dayton and Eastern Company, on the bonds held by it, and motion was made to set the same aside. It seems an appraisal of the property mortgaged was made, under an order of sale, issued at \$270,000, but an order was entered staying proceedings until the determination of the motion to set the decree for sale aside, which was afterward done.

*J. W. Coleman et al.*, stockholders in the Short Line Company, owning nine hundred and sixty-six shares, shortly after the consummation of this sale, viz: on the 16th October, 1865, brought an action in this court to set aside the conveyance and to restrain the Eastern Company from doing anything under it. While this suit was pending, the majority of the stockholders of the Short Line Company executed a paper, in which they state that the plaintiffs in that suit do not represent the subscribers to the paper, and



that "they approve of the sale and desire that the same shall be in all things confirmed, and are ready to give their assent in any form. They are satisfied that said sale was necessary and judicious, and they regard it as highly beneficial to the stockholders and creditors of the said Short Line Company."

In this case both corporations filed an answer in 1865, in which they both allege that the plaintiffs represent the only stock out of eight thousand four hundred and fifty-nine shares opposed to the sale, and they both ask the court to affirm it.

On a hearing of the cause, in April, 1867, a temporary restraining order was allowed in this cause, on the plaintiffs executing bond in \$1,000, which was never done; and on the 19th March, 1870, a final decree in favor of the plaintiffs was entered, and a motion to set that decree aside duly made, and afterward granted.

In 1869, Richard Mathers and Samuel Beresford, executors of George Mathers, deceased, filed a creditor's bill upon a judgment they had obtained against the Short Line Company, and alleged the same was a lien on all its property, and upon which they had levied an execution. To this action the plaintiffs made the Eastern Company and the other creditors parties. They allege that the sale to the Eastern Company was void, and asked a marshaling of liens and a sale of the property of the Short Line Company. To this petition, among other answers, is one filed by the Eastern Company, on February 20, 1870, in which its ownership of sixty-six of the mortgage bonds of the Short Line Company, including those in the Donner judgment, is set up, the provisions of the mortgage to McAlpin and Odlin stated, the priority of the lien asserted, and prays that in case any sale is made that its rights may be ascertained and determined, and the amount of its bonds and interest be first paid out of the proceeds of the sale and other relief. Nothing is said in this answer about the contract, the sale and conveyance to this defendant by the Short Line

Company of July 28, 1865, or of the fact that it had, before this answer was filed, disposed of all its interest in that agreement and purchase to the Sandusky road.

To this answer a reply is filed, that the effect of the sale and conveyance by the Short Line Company to the Eastern Company, on July 28, 1865, was to satisfy and pay said mortgage bonds held by the Eastern Company as it alleges.

No answer appears to be filed by the Short Line Company in this case.

At the April term, 1870, these causes on motion were consolidated, and then, at the January term, 1871, came on for hearing, and the causes, together with the testimony taken before the judge at the trial, were reserved to this court.

It appears further, from the testimony, that immediately on the completion of the agreement of sale by the Short Line Company to the Eastern Company, that it set about resurveying the line from Sharon to Dayton, changed the route in some places, surrendered the old rights of way and took new ones, and took new stock subscriptions from the holders of stock in the Short Line Company which was surrendered, and was about to contract for the building of the line, when, as it alleges, the injunction allowed in the Coleman case stopped the project, and made it necessary to abandon the enterprise; but before that time the Eastern Company had become merged in the Sandusky Company, which, by means of this property, made a very advantageous running contract with the Cincinnati, Hamilton and Dayton Company. It was the imminence of the contract to build this road that brought the Cincinnati, Hamilton and Dayton Company to terms. Rush R. Sloane was and still is the president of the Eastern Company, as he claims, and as such holds the sixty-six bonds of the Short Line Company, payment of which is demanded. He is, and has been, also the president of the Sandusky road, which has reaped and is now reaping all

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the very profitable advantages, larger than its cost, of having held the property of the Short Line Company as a means of obtaining its entrance into Cincinnati over the Cincinnati, Hamilton and Dayton Company much cheaper than the construction of an entrance of its own.

*Burnett & Follett; R. B. Warden, and Durbin Ward, for the Dayton and Cincinnati Railroad Company.*

*Champlin and Judge Caldwell, for Coleman, Evans, et al.*

*Caldwell, Coppock & Caldwell, for the judgment creditors.*

*King, Thompson & Avery, for subscribers to the original stock.*

*Tilden & Maxwell and Ware & Disney, for the Cincinnati, Dayton and Eastern Railroad Company, and the holders of the bonds of the Dayton Short Line.*

HAGANS, J. The contract, sale, and conveyance of July 28, 1865, as between the Short Line Company and Eastern Company must be held binding and valid. It does not appear well that the Eastern Company, after insisting in two answers that the contract is valid and binding, and having in the meantime given the Sandusky Company the benefit of the same, by which it has obtained a very valuable advantage, larger than its cost, should come, in the same action in 1870, and set up the mortgage bonds, and ask that they be paid again by a sale of all the corporate property and franchises of the Short Line Company, and by consequence be entitled to recover back the \$55,000 cash which it had paid for the property it has enjoyed and is now enjoying, and which has long since been distributed to the creditors of the Short Line Company. If there were nothing more in this case than this, we should hold it to be equitable to deny a sale on the prayer of the Eastern Company to satisfy these bonds.

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Again, the contract provides that only in the contingency of failure of title to the part of the property conveyed, the Eastern Company may set up this claim. In any other case the bonds were to be used to make the conveyance operative and available. It would be unjust to allow it to so use and reap the advantage of the property embraced in the contract, as to make it the interest of this company to demand and insist upon a sale of the entire corporate property of the other party to the contract, as though the title to the property conveyed had failed, which has not occurred. We prefer to make these bonds operative and available, according to the contract, as to the property conveyed, and leave the parties where, by the contract, they have placed themselves, and to hold the conveyance and subsequent use of the property as substantially a satisfaction thereof. The propriety of so holding is sustained by the acquiescence of both companies for a period of some four years.

The cause of *Coleman et al.*, however, fairly presents the question of the validity of the contract of July 28, 1865.

It will be observed that this contract embraces only the corporate property of the Short Line Company, and expressly excludes the capital stock, the franchises of the company, the residue of the right of way and other property of the company. It is admitted that the Short Line Company had expended mainly all its means on the three miles of its line, including the great tunnel near and in this city, and was unable to proceed with the work, was largely in debt, was harassed with suits of judgments and taxes to a large amount, which it was unable to pay, and that its creditors, knowing the practical insolvency of the corporation, were pressing for payment and threatening to sell the whole property, which must have resulted in a fatal sacrifice and loss to the proposed road. The embarrassments surrounding the enterprise at the time were insurmountable. The directors of the company, to rid them-

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selves of the most pressing of these demands, to save that portion of the property which was the most valuable to all parties, because the most of its means had been expended there, by this sale made with the assent of all its stockholders except these parties, in fact, preserved the enterprise from ruin, and paid off one hundred and twenty-one thousand dollars of debts, leaving still in the hands of the company the only available and valuable property it ever had. The proceeds of the sale went to the creditors of the road. The sale was unquestionably highly advantageous to the stockholders and other creditors of the company. The transaction presents, therefore, a strong claim that it should be upheld.

It is objected that this sale was destructive of the company. We do not think there is much force in this objection. The corporation is certainly not extinct. It may be that the Short Line Company may yet have the power to build its road to Dayton by another route, as the charters may give it such an option. It may even repurchase very cheap from the Eastern or the Sandusky Company the property sold, or its use, which, as it now asks a sale, appears to have no value to it. The conveyance of the right of way was not the grant of a franchise, but of one of the means by which a franchise may be enjoyed and passed by the conveyance. The Eastern Company, it is admitted, had the unquestionable right to obtain what it did; for it has a franchise to construct and work a road from Dayton to Cincinnati, and there is no reason why it may not purchase a right of way of the Short Line Company as of individuals. The right of way was simply a perpetual easement, and all the conditions upon which it was originally obtained were neither defeated nor violated. (*Junction R. R. Co. v. Ruggles*, 7 Ohio St. 1; *Coe v. Col. & Ind. R. R. Co.*, 10 Ohio St. 384; 1 Redfield on Railways, 247-251.) Besides, by the charter, the company had the right "to commence, complete, and put in opera-

tion any part of said railroad." The disposition of this property does not therefore destroy the enterprise.

An examination of the charter of the Short Line Company shows that it had the necessary power to obtain the right of way and to make the conveyance in the form and manner it did. (2 Redfield, 692.) But it is again objected that the whole matter was done by the board of directors. Besides the general power of the directors over the corporate property conferred expressly by its charter, we think the Supreme Court of Ohio has settled this question in the cases of *Hatch v. The Cin. & Ind. R. R. Co.*, 18 Ohio St. 92, and *Goodin v. Evans*, 18 Ohio St. 167 where this point was made by counsel in the argument. In the first of these cases, the grantee was not complaining of the transaction on that ground; so here the Eastern Company can not complain, as we have seen. In the second of these cases, the power of the board of directors of the Short Line Company, under that clause of its charter which empowers the directors "to transact all business of the corporation," passed under review. And it was held that the board of directors might, without referring the question to the stockholders, accept the provisions of section 14 of the act of 1848, by which they had taken subscriptions of real estate to its capital stock, though they had no right to take such subscriptions under the original charter. Adapting the language of the Supreme Court in that case to this, we may well say: "From the nature and character of this sale, there would seem to be no necessity for referring the question of sale to the stockholders. The disposition of the corporate property was not intended by the legislature to be confided to the individual corporators, but to the corporate body. The charter states that the directors shall be "competent to transact all business of the corporation." This sale, then, was business of the corporation, which the directors were made "competent to transact." It would seem that the stockholders could not have sold and transferred this

property. No one was competent to do it but the board; at least, if the stockholders could do it so might the board; and this would seem to be conclusive that this contract was not *ultra vires*. The subsequent assent and acquiescence of all the stockholders, except those joining Coleman in this suit, representing but a very small minority, furnish strong reason for declaring this sale to be valid, as undoubtedly the transaction was to the great advantage of all the creditors of the corporation. And certainly, if the board had the power to contract, it was their duty to sell, under the circumstances shown in the testimony, if thereby they could at once satisfy the most clamorous of the creditors, and pay their claims, and still have all that was really valuable in the enterprise as far as they had carried it.

But it is said the property of the Short Line Company was in the hands of the receiver of this court. Having found that this contract was not illegal, we do not see how the mere fact that the property of the corporation was in the hands of a receiver can affect it. While he represents the rights of both creditors and stockholders, he can only assert them when they are affected by the fraudulent or illegal acts of the board of directors, and may repudiate illegal transfers of property by the directors acting in the name of the corporation. (Edwards on Receivers, 141.) The other judgment creditors are entitled to a decree in their favor against the unsold property of the company; and the cause will be remanded for further proceedings to subject the unpaid stock subscriptions.

A number of cases were cited to us in argument, but we find nothing fairly opposed to the views we have expressed, and a decree may be taken accordingly.

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Adams Express Co. v. Wentworth.

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THE ADAMS EXPRESS COMPANY, Plaintiff in Error, v. A. S.  
WENTWORTH, Defendant in Error.

A wrongful delivery of goods after an order given by the consignor, founded on the inability of the consignee to pay, to stop *in transitu*, renders the carrier liable; and the subsequent receipt by the consignor of the consignee's note packed in blank with the goods, and an attempt on his part to collect it, does not relieve the carrier's liability unless the note be paid. Where the facts justify it, the notice not to deliver constitutes part of the carrier's contract.

The plaintiff below, the defendant in error, on the 23d of November, 1869, filled an order for goods in favor of one G. W. Franklin, of Leesburg, Ohio, amounting to \$804.22. He packed in the box a blank note at three months for the amount of the bill, to be signed by Franklin, on receipt of the goods, and returned by mail. The next day the defendant's express wagon came to the plaintiff's store, took the goods, and the driver gave the usual receipt. Shortly afterward the plaintiff learned that Franklin was not responsible, and going to the express office, found the managing agent out, but saw an employe, by whom he was told the wagon had not yet reached the office. The plaintiff then, verbally, informed the clerk that he wanted the goods held, and that they were not to be delivered. On the same day he wrote to Franklin inquiring as to his financial condition, and stating in conclusion: "On receipt of your reply we shall ship your goods at once."

The plaintiff supposed his order to the express company had been observed until about the 8th of December, when, having learned that the goods had been delivered to Franklin, he went again to the managing agent and related the circumstances to him, but was unable to recognize the clerk to whom he had given the order to hold the goods, nor was the agent able to learn anything in the matter



from any employe of the company. The plaintiff had probably, again, before that told the agent not to deliver the goods without a written order.

It seems that Franklin was absent from Leesburg when the goods reached that place, and that they were in the express office there waiting his return some six or seven days. It was also proved that by a letter from Franklin, dated December 3d, the plaintiff received the note sent with the goods, duly signed, and on the 15th acknowledged its receipt "in settlement of bill," and offered Franklin four per cent. discount on all money paid before January 1, 1870. Also, that on January 1, 1870, the plaintiff again wrote to Franklin not to pay any money on account before maturity to a certain former employe; that the note was put into bank for collection by the plaintiff, but no amount was ever collected; and that when the goods were shipped and the note matured, Franklin was unable to pay for them. The agent of the company testified that it was the custom when shipments were countermanded for the shipper to show the express driver's receipt, which the plaintiff did not do. On this state of facts, the court below gave judgment for the plaintiff, and exceptions were taken.

*Dickson & Murdock*, for plaintiff in error.

*A. R. Dutton*, contra.

HAGANS, J. As the case stands, we do not feel at liberty to interfere with the finding of facts made by the judge below. The plaintiff in error claims several propositions of law on the testimony. It is said here was no sufficient notice to the company. But we think it fair to hold that the notice was sufficient. Although the defendant in error did not have the company's receipt with him when the order to hold was given, still he might conclude, as the result of his efforts to stop the shipment, even if he knew that the surrender of the receipt was necessary, that its surrender

was waived. Nor was it necessary that he should regain the actual possession of the goods. The notice constituted a binding condition, for a breach of which the carrier is liable. It became part of the contract of transportation. (*Steamboat Owen v. Johnson*, 2 Ohio St. 142.) Of the sufficiency of this notice we have no doubt. If the plaintiff in error did not desire to be responsible, after the order to stop, it might have returned the goods to the shipper instead of running the risk of delivery to Franklin.

It would seem that the company's liability was complete, unless something was done by the defendant in error after the delivery to Franklin, whereby it was so injured as to defeat the right of recovery against it.

It is claimed that the receipt of the note by the defendant in error, which, in his letter of December 15, he acknowledged to be "in settlement of the bill," is a satisfaction of the debt and conclusive that he looked to Franklin alone for payment. But this was not a satisfaction. (*Brown's Assignee v. Wray*, 3 East, 93; *Merrick v. Bowry*, 4 Ohio St. 60; *Leach v. Church*, 15 Ohio St. 169.)

It is urged that this receipt of the note, the retention of its possession until maturity, and all other acts of the defendant in error subsequent to the delivery of the goods, without information thereof being duly communicated to the plaintiff in error, preclude a recovery. But we think not. No damage is shown to have ensued thereby to the plaintiff in error. In fact, these acts all looked to procuring payment of the debt, and if the defendant in error had succeeded, the company would have had the benefit of his success. That he did not succeed can not alter the case, as the company is in no worse condition than before. Indeed, this defense is substantially that because the defendant in error endeavored to collect from Franklin the amount of their bill, and so save the plaintiff in error harmless of all or a part of the loss, he has thereby waived all right of claim against the company and must bear the loss himself.

*The Steamboat Owen v. Johnson*, above cited, seems to us

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a stronger case in these respects than the one at bar. There no question seems even to have been made upon the fact that the consignor collected a large portion of the value of the shipment from the consignee after a wrongful delivery, and brought suit and recovered against the carrier for an alleged balance due upon a disputed account, to which dispute, which was between consignor and consignee, the court would not listen.

It is said that Franklin was not insolvent, and therefore the consignor had no right of stoppage, and the delivery being made the matter is ended. The claim is thus stated, as though this were a question of lien and not of a wrongful delivery of goods. It is enough to say, in this connection, that Franklin was unable to pay for the goods before and at the time of their wrongful delivery, and that by such delivery the vendor's lien was gone, and the injury accrued. The mere inability of the party to pay for the goods, even after their shipment is sufficient for the right of stoppage *in transitu*. (*Benedict v. Schaettle*, 12 Ohio St. 515.)

On the whole case we think the judgment ought to be affirmed.

Judgment affirmed.

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LACKEY McHUGH, Plaintiff, v. THE CITY OF CINCINNATI,  
Defendant.

In April, 1868, the plaintiff was elected one of the three city commissioners of Cincinnati for the term of three years, with a salary of \$2,000 per annum, under the municipal act of 1852, which was repealed by the municipal code of 1869, during the term for which he was elected. The city government was reorganized under the code without the "city commissioners," and the city council refused to pay to plaintiff any salary after such reorganization.

*Held*, that section 728 of the municipal code of 1869, providing that the "mayor, trustees, marshal, treasurer, and all officers elected" and in

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office under the former act, "should remain in their respective offices and perform the duties thereof, under the provisions of this act, until the time should expire for which they had been elected, and until their successors should be chosen and qualified," did not save the office of "city commissioner" to the plaintiff, because the new code provided for the election of no officer who could be regarded as his successor, and his office was therefore abolished by the repeal of the act under which he was elected, and the enactment of the new code.

**IN GENERAL TERM ON ERROR.**—The petition shows that the plaintiff was elected in April, A. D. 1868, to the office of city commissioner took the oath, and gave the bond, and entered upon the duties of the office for the term of three years, at a salary of two thousand dollars per annum. And that since July 1, 1869, the city council has refused to pay the plaintiff any salary, and that on the 1st day of August, 1870, the unpaid salary amounted to \$2,166.66, for which he sues.

To this petition the city demurs, and the ground on which the demurrer is sustained in argument is, that by the municipal code enacted in 1869, the act creating the office of city commissioner was repealed; that the city was organized under the code, and the office of city commissioner has thus been abolished by the legislature.

The plaintiff claims that he is entitled to the protection of the provision that "the emoluments of no officer whose *election* or appointment is required in this act, shall be increased or diminished during the term for which he may have been elected or appointed." (2 S. & C. 1521, 1522, sec. 88.)

This section continues, "Nor shall any change of compensation effect any officer, whose office shall be created under the authority of this act, during his existing term, unless the office be abolished." This section was contained in the municipal act of 1852, and remained in force until the municipal code of 1869 was adopted.

The petition does not aver any performance of duty, or offer to perform duty, in the office to which the plaintiff was elected in the time for which he claims compensation.

But he claims that the salary is incident to the office, and that it is not necessary to allege performance of official duty. Section 76 of the act of 1852 provided for the election of "*three city commissioners*," and prescribed certain duties to be performed by them; that they should perform "such other duties as the council should by ordinance prescribe;" that they, with the mayor and city civil engineer, "should constitute the board of city improvements, and receive such compensation for their services as the city council might determine;" and the board of city improvements were to exercise "such powers, and perform such duties in the superintendence and construction of public works, constructed by authority of the council, or ordered by the city, as the said council might from time to time prescribe."

By section 496 of the municipal code of 1869, it is provided that, "Whenever the council of any city shall establish a board of improvements, such board shall be composed of the mayor, the civil engineer, **THE STREET COMMISSIONER**, the chairman of the committee on streets of the city council, and one resident freehold elector of the corporation, to be appointed by the mayor, with the consent of the council, for such time as may by ordinance be provided."

Section 497 of the same act prescribes "that it shall be the duty of the board to supervise the lighting, cleaning, repairing, and improving of all streets, alleys, public squares," and other public property named, "within the corporation, or the control of the council thereof."

By section 61 of the new municipal code, "The officers of cities of the first class shall consist of a mayor, solicitor, treasurer, *street commissioner*, police judge, prosecuting attorney of the police court, and clerk of the police court, all of whom shall be elected." The section enumerates other officers to be appointed. There is no provision for three "city commissioners," or for any "city commissioner," under that name.

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By section 731 of the municipal code, the municipal act of 1852, under which the plaintiff had been elected one of the three city commissioners, together with a great number of other acts, were expressly repealed.

By section 728, "The mayor, trustees, marshal, treasurer, and all officers elected by the people, or appointed by any municipal corporation, then in office, were to remain in their respective offices and perform the duties thereof, under the provisions of this act, until the time had expired for which they had been elected, and until their successors should be chosen and qualified; but that all such officers should be subject to such rules and regulations, touching their duties and compensation, as the proper authority of any municipal corporation might provide."

*Ware & Disney*, for plaintiff.

*Walker, Conner & Warrington*, for defendant.

TAFT, J. The common council have acted under the municipal code, adapting their ordinances to its requirements, according to which all "street commissioners and other officers" have been elected and have entered upon the performance of their duties under the new code, which commenced on the 1st day of July, 1869, leaving nothing for the "city commissioners" to do. The law of 1852 had been repealed expressly. It is claimed by the city solicitor that there is no place for them under the code, and that their offices were abolished by the repeal of the law creating them.

If the old act under which their offices were created had been repealed by the code without any reservation, the offices would have been abolished, as was held in the case of *Ohio, on the relation of Flinn, v. Wright, Auditor of State*, 7 Ohio St. 333, in regard to the act repealing the act under which Judge Flinn had been elected judge of the criminal

court. We know of no constitutional restriction upon the legislature in regard to municipal officers.

Does, then, the reservation in favor of the mayor and others in office during the term for which they were elected, and until their successors in office should be elected and qualified, save the three city commissioners, of whom the plaintiff is one? Have these three city commissioners any successors under the new code? If they have not and can not have, when must the term of their office be held to expire if not upon the organizing of the city government under the new code, for they were elected for three years and "until their successors should be elected and qualified?" If their offices have not been abolished and they are still in, and no successors can be elected, they have a permanency. If they have successors, who are they? Many of the duties which were required of the city commissioners devolve upon the different officers elected or appointed under the new code. But we think that the three city commissioners can not be regarded as having successors under the new code, within the meaning of section 28 of the act, which provides for the continuance in office of the mayor and others named. If they have any successor it must be the street commissioner. But if these three city commissioners, under the old law, could be succeeded by one street commissioner, they could not constitute a part of the new board of improvements, with the mayor, engineer, chairman of the improvement committee, and resident elector to be named by the mayor. If they were to be taken into that board, it would not be what the code provides. If, on the other hand, we were to attempt to administer the law on the plan of preserving the old board till the term of its members should expire, we should find no less trouble. These three city commissioners would go out of office one at a time, leaving that board imperfect, and there could be no introduction of the new officers elected under the code, as that would make a board such as neither act has ever provided for.

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On the whole, we think that the purpose of the new law was to repeal the old act as to the office of city commissioners, and abolish the office, the consequence of which was also to abolish both the duties and the salary.

[Leave to file a petition in error in the Supreme Court has been refused.—EDS.]

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H. S. & W. S. SMITH v. DALTON, COLEMAN & Co.

FURNESS, BRINLEY & Co. v. THE SAME.

A., left Ohio with his family for New York, with the intention to return if he could compromise with his creditors there, or to remain if he could not do so and could get employment, neither of which contingencies happened. Attachments were levied on his real estate in Ohio, and he shortly afterward removed to Kentucky.

*Held*, that he was not a non-resident of Ohio within the meaning of the foreign attachment law.

Mere non-residence for any length of time, unless aided by some unequivocal act showing intention not to return, will not cause the loss of domicile in the State.

No bond was given according to S. & S. 593.—*Quere*, is this proceeding in error well taken?

ERROR TO SPECIAL TERM.—The facts are presented in the opinion of the court.

*Matthews & Ramsey*, for H. S. & W. S. Smith.

*Thomas T. Heath*, for Furness, Brinley & Co.

*Abram Brower*, for Coleman.

HAGANS, J. These cases stand on the same question. They are foreign attachments, issued October 31, 1870, and levied upon real estate in this city, against Charles J. Coleman, one of the defendants; and the question is, whether he is a non-resident of this State within the meaning of the Code, and presents itself on his motion to dissolve,



which was overruled by the judge at Special Term, and exceptions taken.

The judge at Special Term made a special finding of facts on the evidence adduced at the hearing:

"That Charles J. Coleman, in consequence of the failure of business of the firm of Dalton, Coleman & Co., and partially influenced by the advice given to him by George W. Jones, as set forth in the affidavit of said Jones, went to New York to seek employment, and also to make an effort to obtain a compromise with the creditors of said firm, intending to return to Cincinnati if he could effect a compromise with the creditors, and to remain in New York if he obtained employment and could not effect a compromise—his intentions being conditional. That he remained in New York until about the middle of June, 1870, without employment and without effecting the compromise, when he removed to the 'Gatewood Farm,' in Campbell county, Kentucky, where he continues to reside with his family. That while in New York he wrote to H. P. & W. P. Smith a letter which is attached to the affidavit of W. P. Smith."

Referring to this letter, dated October 17, 1870, it appears that Coleman discussed with the Smiths the value of an interest in this city he had inherited, and assured them it was worth nothing; and stated he was unable to obtain employment, and was living on the charity of his wife's relatives, and expresses regret that they would not compromise.

The advice of Jones to Coleman, referred to by the judge in the finding of fact, was to the effect that Jones told Coleman, about May, 1870, that in the estimation of the business men of this city, the failure of Dalton, Coleman & Co. was brought about by the personal habits of Coleman himself, and he was looked upon with distrust and aversion, and he would find it hard, if not impossible, to get a situation here, where his way was hedged up; and Jones then advised him to leave this city and go to some other place, where he could enter business again under

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more favorable circumstances. Jones suggested New York, St. Louis, and Chicago as favorable points. Coleman assented to these views, and the next day he and his wife went to New York with their baggage, and remained there until about November 20, 1870, when Jones leased to Coleman the 'Gatewood Farm,' in Kentucky, where he removed November 25, 1870, to be used as a dairy and a home, and he still resides there.

As a conclusion of law from the foregoing facts, the judge "finds that the said Coleman was not a resident of New York, or a non-resident of Ohio, at the date the attachments were issued, and that the attachments ought to be dissolved, which is done." In looking into the affidavits, there are intimations that Coleman intended to return to this city at all events. The error assigned is that the judge, at Special Term, ought not to have granted the motion to dissolve the attachments.

The attachment was issued on October 31, 1870, and if Coleman was then a non-resident, within the meaning of the attachment law, it was good. It is said the *actual* non-residence of the defendant must determine the right to an attachment, although it may be admitted his domicile for many purposes may be in Ohio; and that unless this view of the law is adopted, a creditor will be frequently without any remedy against his debtor. In support of this view the cases of *Isham v. Gibbons*, 1 Bradford, 69; *Haggart v. Morgan*, 1 Selden, 422; *Holmes v. Greene, etc.*, 7 Gray, 299, and *Whitney v. Sherborn*, 12 Allen, 111, are cited to us. But one of these (1 Selden, 422) is a case founded upon an attachment, where that distinction is fairly recognized, and the court quotes, with approval, *The matter of Thompson*, 1 Wend. 45, and *Frost v. Brisbin*, 19 Wend. 14. The question of residence has frequently arisen, both in this country and in England, to determine the succession of personal property or jurisdiction as to the settlements of estates or the right to vote, etc., and it would not be profitable to discuss them in this connection, for one may have a resi-

dence for one purpose and not another. But in determining whether a party is a resident or non-resident within the meaning of the attachment law, the question as to his domicile is not always involved. A man may have a residence which is not in law his domicile. "Domicile includes residence, with an intention to remain, while no length of residence, without the intention of remaining, constitutes domicile." (Drake on Attachment, sec. 58.)

There can, then, be but one question for us to determine, viz: whether Coleman had the intention of remaining in New York at the time the attachment was issued.

In this case there can be no question but that Coleman's residence was in Ohio before he went to New York. Now, it depends on all the facts and circumstances of the case whether he then lost it. It is not enough that he should leave his place of abode in Cincinnati, and should go to New York to seek a new residence (*Pfoutz v. Comford*, 36 Penn. St. 420); for he does not thereby *acquire* a new residence, but still retains the old one. "Residence," says the court, in the case just cited, "is, indeed, made up of fact and intention. It is not broken by seeking another abode, but continues till the fact and intention unite in another abode elsewhere." And this court has recognized the same doctrine in *Eagan v. Lumsden, etc.*, 2 Disney. 168, where it is said, "that absence from one's home for years, when the party left with the intention to return, if, in the meanwhile, the intention to return is not destroyed by some *unequivocal* act, signifying a purpose to change the domicile, does not defeat this right to claim his former residence as if it had never been interrupted by his absence." The mere intention to remove, without actual removal, will not avail, any more than the fact of removal without the intention to acquire a new residence. And one can not be said to have acquired a new residence until he has lost the old one. The very fact that Coleman's remaining in New York was contingent, and that that contingency had not happened when these attachments were sued out,

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would seem to be decisive in the views which we have expressed. And we are satisfied that not until he resolved to remove to Kentucky, and did so, did he lose his residence in Ohio. But this was after the attachments were issued.

In this issue, the burden of proof is on the plaintiffs, and the fact of non-residence must be made out to the satisfaction of the court. (*Canton v. Paige*, 9 Ohio St. 397.)

We do not think the party has done so; for besides the fact that Coleman had valuable interests here, there are declarations of an intention on his part to return to Ohio while he was in New York. Our attention has been called to the fact that there is no compliance with the amended act relating to proceedings in error in this class of cases. (S. & S. 593.) We find that no bond has been given. This may be fatal to this proceeding in error. We have preferred, however, to dispose of the case on its merits.

The judgment must be affirmed.

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THE EAGLE WHITE LEAD COMPANY, Plaintiff, v. THE CITY OF  
CINCINNATI ET AL., Defendants.

Spring street was originally laid out and opened twelve feet in width from Court to Hunt street, and in 1844, James Hunt, the proprietor of the property on the east side of said street, in making a lease for ten years to Heming of the ground now owned by the plaintiff, reserved for an addition in width to said street a strip of ground twenty-eight feet wide, which he threw open, increasing the width of Spring street to forty feet. In 1848, the said Hunt agreed with the holders of said leasehold that the strip of twenty-eight feet of ground might be reduced to eighteen feet, leaving the street thirty feet in width, agreeing that they should have a private right of way over said strip of ground; and Spring street, of the full width of thirty feet, has been open and used by the public as a public street since 1844, and is now so used.

*Held*, that said strip of ground, eighteen feet in width, is to be regarded as part of Spring street and public property.

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The plaintiff owned the Eagle White Lead Works, erected upon its lot fronting on Spring street, one hundred and thirty feet north of Court street, Cincinnati. The improvements upon the plaintiff's lot were valuable, and were erected in 1852. In 1868, the city council, by ordinance, changed the grade of Court street from the grade established in 1833, so that, at its intersection with Spring street, it was nineteen feet above the old grade, making the grade of Spring street, from the plaintiff's premises to Court street, an ascending one, and, though practicable less convenient as an access to plaintiff's property than it was before.

*Held*, that the right of the plaintiff in Court street and in Spring street, from plaintiff's property to Court, was merged in that of the public, and that the injury resulting to the plaintiff from such lawful improvement in Court street is speculative, and too remote to be made the foundation of a recovery against the city.

This suit was brought to recover damages from the city caused to the improvements of the plaintiff, upon a lot fronting on Spring street, between Hunt and Court streets, by raising the grade of Court street at its intersection with Spring street. The grade of Court street was raised in connection with Gilbert avenue, and other street improvements in Deercreek valley, some nineteen feet at the point where it passes the street on which the plaintiff's lot is situated. The plaintiff's lot is one hundred and thirty-eight feet north from Court street. It is claimed, by the plaintiff, that the raising of Court street rendered it necessary to raise the street in front of its premises; and that in consequence of raising the street in front of the lot of the plaintiff, its improvements, which were valuable and permanent, would have to be taken down and raised to a corresponding level.

The question of damages, on the hypothesis that the plaintiff was entitled to be indemnified for the loss sustained by such change of grade of Court street, was submitted to a jury, who found a verdict for \$1,700. The plaintiff also claims a private right of way, in the east, eighteen feet of the ground opened and used as part of Spring street, and that he is therefore entitled to be regarded as an owner whose property fronts upon Court street. The

question whether the city is liable to the plaintiff for such damages has been reserved to this General Term, on a motion to enter judgment against the city for the amount assessed by the jury.

*Tilden & Goodman*, for plaintiff.

*Walker & Conner*, for defendant.

TART, J. By the agreed statement of facts accompanying the reservation, it appears:

"That the title of the property of the plaintiff is derived from the following leases and deeds, which are annexed to the statement, viz: lease from John Frazer, trustee, to Heming; lease from Heming to Conklin; lease from Hunt and Pendleton to Conklin; lease from Hunt to Conklin; deed from Hunt to Conklin, Wood & Elstner; deed from Wood & Elstner to Eagle White Lead Company. The agreement between Conklin, Wood & Co. to Hunt is offered in evidence, subject to the decision of the court as to its relevancy, admissibility, and effect.

"It is agreed that the space of thirty feet or more, now open, has been open and unobstructed to the same extent that it now is ever since the date of the lease to Heming, in the locality of the street called for in that lease, and has during all that time been used by those of the public desiring to pass that way as a public street.

"It is also admitted that the plat annexed to said statement is a correct exhibit of the location of the streets and property in that vicinity."

To understand the claims of the plaintiff as an owner of a private right in the eighteen feet of Spring street, it is necessary to give an outline of the history of Spring street and of the plaintiff's title.

In 1844, Spring street, extending south from Hunt to Court street, was only twelve feet wide, and it ran parallel to Broadway, and distant about one hundred and seventy

feet eastwardly from it. On the east side of this Spring street, there was a lot of land belonging to James G. Hunt, then in the hands of a trustee for him, extending along Court street some three hundred and twenty feet, and along the east side of Spring street three hundred feet. In January, 1844, John Frazer, the trustee of James G. Hunt, made a lease to one Wellman for ten years of a lot distant one hundred and thirty-two feet north from Court street, and fronting on Spring street thirty feet. In August of 1844, Frazer, as trustee, granted a further lease to Heming of a portion of the residue of the lot, and the entire residue of what was called the "tanyard lot," and extending northwardly from the Wellman lot, on the east side of Spring street about one hundred and twenty-four feet, for fifteen years. At this time there was granted, by the trustee of Hunt, a strip of ground twenty-eight feet wide from the west side of the Hunt tract, lying next east of Spring street, and extending northwardly from Court street to the north line of the Hunt tract; so that, in front of the premises granted to Wellman and Heming, there would be a street forty feet wide, extending to Court street, and north from said premises to Hunt street, Spring street would be but twelve feet in width.

In August, 1848, Conklin, Wood & Wood purchased from Hunt the interest of both the lessor and lessees under said leases. Hunt, who had succeeded his trustee, made a lease of the premises for a term after the expiration of the former leases. At this time it was agreed that the twenty-eight foot strip of ground should be cut down to eighteen feet, so as to make a road or street thirty, instead of forty feet wide. This lease granted the premises by a description bounding them on the west by Spring street, but excepted from it a strip of ground eighteen feet wide, running from north to south along the west side, which strip of ground was declared in the lease reserved to be used as a private street between said Hunt and said Conklin, Wood & Wood.

Conklin, Wood & Wood occupied the premises till 1853; they then, with John Elstner, purchased the reversion from Hunt, and received a deed from him. No provision was inserted in that deed for the eighteen feet, but the premises were bounded on the original twelve feet, or Spring street, although the forty foot street was referred to as described in the lease to Heming. It was, however, stipulated, in a paper executed at the same time, "that they would keep open for their mutual benefit a strip of land eighteen feet wide off the east side of Hunt's tanyard lot, and that they would mutually bear the expense of paving or grading Court street in front of said eighteen foot strip."

But it appears that from 1844 this street has been open at least thirty feet wide, and all the while used by the public as a street, and that it is now so used. Without going further into the history of Spring street, and the variety of arrangements as to its width, but taking into consideration the fact that this Spring street has been open and traveled as a public street, for at least the width of thirty feet, for twenty years and more, we think that, under all the circumstances, the intention that it should be a street was long since established, and that it could not be lawfully closed up. This dedication was, in the view we take of it, complete and accepted prior to the act of 1865, requiring the acceptance of dedications by ordinance.

We conclude, therefore, that the plaintiff has no such private ownership in the eighteen feet as to claim the rights of an owner of a lot fronting on Court street.

As to the question whether a plaintiff can recover for damages consequent upon an improvement of a street on which his property does not front, it is proper to consider what has been decided in our courts on the subject of damages caused by changing grades of streets, and on what grounds the decisions have been placed. In England, and in other States than Ohio, it has been held that a municipal corporation has full power over the improvement of streets, and may raise or depress the grades with-



out liability to the owners of property fronting on the streets. In Ohio, our courts have not doubted that the municipal corporations had full power over the grades of the streets, and could raise or depress them at pleasure; but they have determined that if a grade has been once established, and the owner of property fronting upon the street has erected improvements suited to the established grade, and the city changes such established grade so as to cut off or injure the access to the improvements from the street, the owner may recover damages. This is an exception to the common law, as held in England, and other States of this country, but it is well established in Ohio. The principle does not apply to improvements made by an owner before a grade has been established. He is bound in such a case to anticipate, at least, any reasonable change of grade from the natural surface, and if he erects his improvements so low or so high as not to suit such reasonable grade when established, he can recover no damages.

No decision of our courts has gone so far, hitherto, as to give damages to owners of property not fronting on the street whose grade has been changed; and we do not feel justified in enlarging the exception which our courts have introduced into the common law. If we should enlarge it so as to give damages on other streets than those on which the property fronts, it would be difficult to fix any practical limit, or to tell how many suits would be brought against a city whenever it should venture to improve a street. The cost of litigation and damages would be greater than the cost of the improvements.

The ground on which our Ohio courts have given damages is, that a man whose property bounds upon the street has a peculiar interest in the street, to which he has adjusted his improvements. That this doctrine does not extend to the making of the access to an owner's property less convenient by a change in the location of a road near, but not upon, the land of the owner, was decided in the late case of *Jackson v. Jackson*, 16 Ohio St. 163. In that

case it was shown that the road which passed through the plaintiff's premises was changed, not on his premises, but immediately on leaving his premises, so as to make his egress or ingress from and to his home much less convenient than by the old-established road.

The court say, page 168: "The private rights of the owner of lands in the adjacent highways, upon principle, are the same as those of the owner of lots in towns to the adjacent streets. In either case they are, to a great extent, modified by attending circumstances. Such owner has a private right of access to and from the street or highway; and when he has made improvements on his land with direct reference to the *adjoining* highway as then established, and with reasonable reference to its prospective improvement and enjoyment by the public, he has a private right of way, or passage, to and from the highway as it then exists; and any substantial change in the highway, to the injury of such passage or way, is an invasion of his private property; and this private right extends so far as the reasonable and convenient use of the *adjacent* highway; but beyond such necessary use thereof, the private right is merged in that of the public. Especially must this be so, when, as in this case, the alteration of the road complained of is not adjoining the lands of the plaintiff, and the injury thereto is, at most, remote and consequential."

The same principle, we think, applies to the present case. If the plaintiff's property is rendered less eligible by a necessary improvement of Court street, on which its property does not bound, by reason of the consequent increase of the grade of Spring street from the property of plaintiff to Court street, the injury is too remote to be compensated, and the private right of the plaintiff must, to that extent, be regarded as merged in that of the public. If Spring street should be graded up in front of the plaintiff's property without his consent, and the access to its improvements should be thereby cut off or injured, a case would be made within the principle of the Ohio decis-

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ions. But the simple fact, that the plaintiff, in passing along Spring street to Court street, now encounters an ascent instead of a descent as before, is not a ground of recovery, although it should appear that plaintiff's property was made less valuable by the change.

A finding of damages in such a case must, at least, be regarded as speculative and very uncertain. It is not claimed that the access to plaintiff's property by Spring street is cut off. The grade is not very steep at present; and the worst that can be claimed is, that for hauling heavy loads, the draft is more severe than it was before.

From the statement of facts, we are satisfied that no damages have been shown which entitle the plaintiff to a recovery.

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THOMAS BAINE AND WIFE v. JOHN BICKETT AND WIFE.

A married woman, tenant for years, may, by joining her husband with her, maintain a suit against the lessor for the specific performance of a contract to convey the fee to her, and when the purchase money is paid, can compel the execution of a conveyance, in the absence of a covenant to do so sooner.

The lessor encourages the permanent improvement of property by tenants for years, in expectation of their being allowed to purchase the fee, and afterward contracted accordingly.

*Held*, that the estoppel against his afterward refusing to convey the fee, on the ground that the plaintiff was a married woman, ran with the land, and a subsequent purchaser from him, advised of all the facts, was bound thereby.

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**ERROR TO SPECIAL TERM.**—The facts appear in the opinion of the court.

*Yaple & Healy*, for plaintiff in error.

*C. D. Coffin*, contra.

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HAGANS, J. This cause presents the same facts and questions as *White v. Bickett*, reported post p. 170, with the additional question—the lease having been made to one Honohan, and now, by regular assignment, having become vested in Mrs. Baine, whether the court could enforce the contract in her favor. It was claimed that this could not be done, as she was a married woman, and that there was no mutuality in the contract.

The proof shows that Thomas Baine attended both meetings of the tenants on the 13th and 14th of February, acting in behalf of himself and his wife, and he would be bound to pay for the land. There was a cottage on the lot in controversy, worth \$1,500 or \$1,600, put there under the same circumstances stated in *White v. Bickett*. In all other respects this case stands on the same footing as that.

Is this contract then wholly inoperative so far as the wife is concerned? We think not. The terms of the contract do not require that either a deed should be executed by Bickett on the one hand, or notes or mortgages by the renters on the other. Bickett, by retaining the title, has adequate security for the performance of the contract as to the payment of the purchase money, and when the contract is once completed by the plaintiff he will be bound to convey. And there seems to be no sufficient reason, under the circumstances, that Mrs. Baine should be deprived of the advantage of this contract, having tendered \$400, and being willing, ready, and able to pay the balance as it matures, simply because she is a married woman, unless there is some plain opposing principle. It would, it seems to us, be unjust in the highest degree, to give Bickett, after all that appears in this case, the benefit of those expenditures without cost to him, especially when they add to his security for the faithful performance of the terms of the contract, and indeed, together with the money partly paid, give him the means on his part to enforce it against the plaintiffs, while the bringing of this suit gives him the right to do so.

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We think this a clear case for the application of the doctrine of an estoppel *in pais*. There can be no doubt but that both Archbishop Purcell, while he owned this land, and Bickett, while acting as his agent, and as owner of these leases, encouraged these tenants to make substantial improvements on their respective lots, in hope and under the promise of the right to buy the fee at a fair price. And with a full knowledge of all these facts, the contract of February 14th was made with Mrs. Baine, by which these hopes were rendered absolute and certain. Certainly the archbishop would have been estopped from setting up the defense made by Bickett in this case. In good faith the archbishop would be bound to carry out the understanding if he now owned the property. To hold otherwise would be to hold that he would have the right to perpetrate a fraud on this plaintiff, which it is the very purpose of an estoppel to prevent. For, on the faith of this understanding, these tenants erected substantial improvements. There was a change of conduct on their part, which would not have occurred but for these promises. (*McAfferty v. Conover*, 7 Ohio St. 99; *Morgan v. Spangler*, 14 Ohio St. 102.)

A party will be concluded from denying his own acts or declarations, which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter. And in such a case, in good conscience and honesty, the party ought not to be permitted to gainsay his admission. And this obligation thus imposed upon Archbishop Purcell, the propriety and force of which he always recognized, must be equally binding upon Bickett, who is his grantee and privy. His title is subject to all the consequences of the state of things at the time of the conveyance to him. For these consequences adhere to the land and are transmitted with the estate, and Bickett, when he acquired the title, took it subject to the burden which the existence of the facts imposed upon it, of which he was fully advised.

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(*Douglass v. Scott*, 5 Ohio St. 19; *Bocock and Wife v. Gavey*, 8 Ohio St. 270; *Kitzmiller v. VanRensselaer*, 10 Ohio St. 68.)

Other considerations were adverted to on the argument, but they do not conflict with the views we have expressed. Judgment affirmed.

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CHRISTIAN HAUSER, Plaintiff in Error, v. GOTTLIEB METZGER,  
Defendant in Error.

In a suit on a promissory note, the answer was that "the defendant denies all the allegations of the petition."

*Held*, that such an answer was equivalent to the general issue, and did not authorize, under the Code, proof of special matter by way of defense.

When, by consent of both parties, a jury is waived, and a cause submitted to the court, neither party can subsequently withdraw his waiver and demand a jury, unless for special reasons to be determined by the court.

ERROR TO SPECIAL TERM.

*Kebler & Whitman*, for plaintiff in error.

*Forrest & Lindemann*, contra.

STORER, J. Two questions are presented by the bill of exceptions filed in the cause, judgment having been rendered for the plaintiff by the court below.

The action is upon a promissory note made by Jacob & Brill, payable to the defendant or his order, for \$1,291.15, and alleged to have been indorsed by him to the plaintiff. The answer is, "that the defendant denies all the allegations set forth in the petition and asks judgment." No set-off or counter-claim is set up, nor any denial of indebtedness.

On the trial below, it appears the defendant attempted to prove the note was a forgery, and was allowed to do

so, notwithstanding he had virtually admitted its genuineness by not specifically denying the existence of the note. This privilege granted to the defendant involved the fact whether the note was genuine or not, and made it necessary, on that issue, for the judge to state, that in all cases of a criminal nature, the court or jury trying the case must be satisfied beyond a reasonable doubt, and that on the hearing of this case the rule he suggested would govern him. In this, we think, he was clearly right. Although the preponderance of the testimony, when no crime is charged, is the rule to determine ordinary actions, yet where it is, the testimony should be free from all reasonable doubt.

We are satisfied that no error was committed in thus adhering to the decisions of our courts in similar cases. (*Lexington Insurance Company v. Paver*, 16 Ohio, 324; *Strader et al. v. Mullane et al.*, 17 Ohio St. 626.)

We think that the answer was what would be regarded, before the Code, as the general issue; and it was a principle of the Code to do away with mere traverses, and compel the defendant to set out in his answer, in a substantial manner, his whole defense. Here the plaintiff was not advised of what the defendant intended to do, and as was said in *Knox County Bank v. Lloyd's Adm'rs*, 18 Ohio St. 365, such a pleading should be disregarded.

Another error is assigned, that the court would not grant a trial by jury, though requested to do so by the defense.

We find the case was regularly set down to be tried on submission and had been for several terms; witnesses had been summoned and preparation made by the parties to dispense with a jury. This we have always held to be a waiver by both parties of a jury trial, and ought not, except in special cases, to permit either party to withdraw his consent to a submission. If we did not adhere to this rule, it would be difficult to limit parties in their application for a *nisi prius* trial.

When a case is once fairly left to the court, and is set

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down by the counsel of both parties to be heard, it is but just that it should abide the result of a trial before the tribunal they have selected.

Judgment affirmed.

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R. W. LAMPTON ET AL. v. W. T. NICHOLS.

Where an action was for money and for special and general relief, and an account of partnership transactions was asked, and a reference was ordered, an account taken, and a report made and confirmed, the taxing and apportionment of costs were in the discretion of the court under section 554 of the Code.

Where a judgment was rendered on such a report for the plaintiff, without any allowance of compensation to the referee, the judgment as to the costs was irregular, and the court had power, on a motion of the referee made at a subsequent term, to modify the judgment as to costs, and allow a reasonable fee, and order the plaintiff to pay it.

This cause went to General Term, on a petition in error, to reverse an order of one of the judges at Special Term, taxing the referee's fee of \$350 in the case, and ordering the plaintiff to pay it.

*King, Thompson & Avery*, for plaintiffs in error.

*A. R. Dutton*, for defendant in error.

TAFT, J. This order was entered at the November term. The case arose out of a partnership in iron manufacture in Carter county, Kentucky, carried on under the name of the "Star Furnace."

The plaintiff brought a suit to compel a settlement of the partnership concern. It involved a wide investigation. In June, 1868, on the plaintiff's motion, the referee was appointed, and proceeded under the order to take voluminous testimony and make an elaborate investigation. In



May, 1870, he filed his final report, finding a balance of about two thousand dollars in favor of the plaintiff. On motion of the plaintiff, this report was confirmed in July, 1870, and a judgment taken in favor of the plaintiffs for the amount as reported by the master with their costs therein expended, but without any allowance to the referee for his services.

In November, 1870, the referee finding himself left out of the decree made the motion to which the plaintiffs object, asking that he be allowed a fee for his services as referee, and that inasmuch as the defendant was insolvent, and the labor had been done at the instance and for the benefit of the plaintiff, the plaintiff be required to pay it. There is no complaint of the amount of the fee, and the voluminous character of the report, with the accompanying evidence, indicates that the fee is reasonable.

The plaintiffs raise two objections to this order:

1. That it requires the plaintiff to pay the fee, and not the defendant.
2. That the order was made after the term at which the decree of confirmation was entered.

As to the first point, it raises the question whether the court has such power over the costs as to protect its officer, and require the parties for whom services have been rendered to pay for them.

The Code provides (section 551): "That where it is not otherwise provided," by statute, "costs shall be allowed, of course, to the plaintiff upon judgment in his favor, in actions for the recovery of *money only*, or for the recovery of specific real and personal property." Section 552 provides for particular cases which have no relation to this case, and section 553 provides that, "costs shall be allowed, of course," to the defendant upon a judgment in his favor, in the cases comprehended under sections 551, 552.

Section 554 provides that, "In other actions the court may award and tax costs, and apportion the same between

the parties on the same or adverse sides, as in its discretion it may think right and equitable."

The present case, in our opinion, falls under section 554, and not under 551. It is not "an action for the recovery of money only." It is not such in its nature, nor is the preceipe so indorsed. The indorsement is "an action for money and specific and general relief." It is not for money only, and "relief" is the very element in a case which renders it necessary that a court should have discretion in making the order in regard to costs. We are satisfied that the court had in this case a discretion in the taxation and judgment for costs, and, moreover, that it would not be going beyond a legitimate exercise of its power to provide that the referee should be paid his fee if either party was able to pay it, or if there was any fund in the case sufficient to pay it.

As to the second question, whether the court could entertain the motion to allow the referee a proper fee in this case after the term at which the judgment was rendered, there is some difficulty, as our practice has not furnished precedents. By section 289 of the Code, it is provided, "That the referees shall be allowed such compensation for their services as the court may deem just and proper, which shall be taxed as a part of the costs in the case."

There is a distinction between a judgment for costs and a judgment for the debt or damages. An entry of a judgment, without any provision for the costs, would be an irregularity; and we think that this judgment for costs, without making any allowance for the referee, who had done more than all others in the case, and whose fee was the principal item to be taxed, was an irregular judgment as to costs, and as such was liable to be set aside and re-taxed on motion. The distinction between that part of the judgment which relates to costs and that which relates to debt or damages is well established by numerous decisions in New York, and the power of the court to set aside

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the judgment for costs, and correct it by a re-taxation, without disturbing the judgment for the damages, has also been settled after a variety of decisions. (5 How. Pr. 233; 20 How. Pr. 215; 17 Abb. 37; 16 Barb. 658.) The earlier cases held that an irregularity in taxing costs made the entire judgment irregular, and so liable to be set aside on motion. But a distinction is well established between the judgment for costs, and that for debt or damages.

The taking a judgment on a report of a referee without assessing the fee to the referee, we regard as an irregularity in the judgment for costs, for which the referee has a right to move to set aside the judgment as to costs and have a re-taxation. There is a propriety in allowing the referee to have such an irregularity corrected, for the reason that though entitled to have the benefit of the judgment for costs, he is not so a party, as to be chargeable with want of diligence in not pressing for his fee after he has discharged his duty by filing his report. He is entitled to rely upon the justice of the counsel and the court to provide for his reasonable compensation as a part of the costs in the case, as expressly required by the statute.

The Code expressly provides that the court may vacate or modify its judgments after the term, "for mistake, neglect, or omissions of the clerk, or irregularity in obtaining a judgment or order." (Sec. 534, 3d clause.) And this is in accordance with the practice previous to the present Code. (*Hunt v. Yeatman*, 3 Ohio, 16; *Reynolds v. Stanberry*, 20 Ohio, 344.)

The judgment of the judge at Special Term is affirmed.

## JOHN BICKETT AND WIFE, Plaintiffs in Error, v. THOMAS WHITE, Defendant in Error.

A. seized of lands occupied by his lessees for terms of years, conveys the fee to B. Subsequently, in B.'s presence, and with his oral acquiescence, A. gives a promise in writing to the tenants of a privilege of purchase of the fee by them on easy terms. B. afterward refuses to recognize the agreement.

*Held*, that under the circumstances A. acted as the duly authorized agent of B., and the written promise was good within the statute of frauds.

That a written agreement, signed by the party to be bound thereby, though only accepted orally by the other party, is good within the statute, and that there is, in such a case, no such want of mutuality as to invalidate the contract.

That where one party refuses to recognize the terms of a contract or to be bound thereby, it is sufficient for the other party, in a suit of specific performance, to prove ability, readiness, and willingness to perform the contract on his own part. No tender need be proved if it were certain to be refused.

**ERROR TO SPECIAL TERM.**—The facts appear in the opinion of the court.

*F. Ball, and Yiple & Healy, for plaintiffs in error.*

*Stallo & Kittredge, contra.*

HAGANS, J. This is a suit for the specific performance of a contract. The evidence in the cause shows that on the 8d of January, 1855, John B. Purcell, Roman Catholic Archbishop of Cincinnati, by John Bickett, his attorney in fact, leased to Thomas White, a lot of twenty by sixty-eight and one-half feet, on the west side of Cutter street, in said city, lying three hundred and fifteen feet north of Court street, and being part of the "Goshorn" property, the title to which was for a long time in litigation, which was ended after the execution of this lease, and the title in fee made perfect in said Purcell. This lease, as well as leases to several other persons, for portions of the same

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tract, was for thirteen years, at a stipulated rent payable quarterly, and provided that the lessee should put on the premises at his own cost any proper improvements, which, at the end of the term, he was at liberty to remove. It seems the property, both on the east and west sides of Cutter street, between Court and Clark streets, was leased, there being about sixty tenants in all. On the west side of Cutter street the lots were one hundred and thirty-eight feet deep to Kossuth street, and the lot of the plaintiff, numbered eighteen, ran west but half the depth of the lot; the Kossuth street front of lot eighteen being occupied by Mrs. Doyle, who was the assignee of Barney Ganty, running half the depth of the lot east. Bickett was the agent of Purcell to collect the rents and manage the property. On the 31st March, 1855, said Purcell conveyed all his interest in these leases, some sixty in number, including White's lease, to Bickett, who thereafter collected the rents and managed the property in his own right. It appeared that Bickett encouraged the tenants to make permanent improvements on this property, both before and after the assignment to him, under the assurance that when the title to the lot was settled they should have the right to buy the fee at a fair price. As has already been stated, said Purcell obtained a good title to the property. On the 26th of January, 1867, Bickett made a proposition to buy the property from the archbishop which was accepted; and on the 5th of February, 1867, in consideration of \$90,000, said Purcell conveyed the same in fee to Bickett, who executed a mortgage to secure the unpaid purchase money. It seems that up to this time these tenants, including the plaintiff, rested upon the faith of the assurances that they should have the right to buy their respective lots as long as the archbishop owned the property, but immediately upon a well-founded rumor of the sale to Bickett they became uneasy. The deed to him was not recorded until the 16th of May, and the mortgage until September 17, 1867. On the 13th of February, 1867, a meeting of the tenants

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was called to consider the position of affairs, and it was attended by nearly all of them. Its purpose seems to have been to ascertain the truth and to protect their supposed interests. The meeting refused to allow the mention of Bickett's name, and appointed a committee of five, of which White was one, to wait on the archbishop. On February 14, they presented a written petition to him, and at that time were advised of the fact of the sale. This petition is lost, but its purport was to ascertain from him what the property could be bought at. He assured them he had made provision for them in the sale to Bickett, and answered the petition in writing the same day at their request, signing his own name as archbishop. After advising them that he had given them nearly a year's warning of his purpose to sell, he states that "the renters shall have pre-emption before all others of the ground they occupy. The conditions of sale are the following: The lots on the east side of Cutter street are to be had at \$110 a front foot, by one hundred and twenty-six feet deep to Bickett's alley; that is, if they pay as much as they can, say \$1,000, before the 1st of January, 1868, as best suits their convenience. If not paid within that time the price will be \$120 a foot. \* \* \* On the west side of Cutter \$140 a foot front by one hundred and thirty-eight deep, the front part of the lot not to be sold unless it be bought all through. Those who buy a half lot on Kossuth street shall have it at \$60 a foot front by sixty-eight and one-half feet deep. \* \* \* Those who pay all down shall be allowed a discount the same as has been allowed to Mr. Deagan. The price here proposed has been offered by others, say \$150 a foot west side of Cutter street, they who make this offer proposing to build fine substantial brick houses. From six to ten years will be allowed to purchasers who pay down a reasonable sum, say \$400, the balance at six per cent."

This written answer was read the same evening at a meeting of the tenants, and the terms therein contained accepted by resolution.

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The court below found by the weight of testimony—and this finding we have no disposition to disturb—that this writing was prepared by the archbishop in the presence of Bickett and assented to by him. It was read over to the committee in Bickett's presence and his approval obtained. He afterward disavowed the terms contained in it. It seems Bickett had drawn up propositions of sale dated January 26, 1867, the very day of his purchase from the archbishop. He had effected a sale or two under them, and placed them before the archbishop when he was preparing his answer to the tenants on February 14, and insisted that should be incorporated in that answer. But they were not, and Bickett chose to assent to the terms contained in the answer, stating distinctly to the committee "these are my terms," and the tenants accepted them before any repudiation of them by him, and he was notified of the fact. When he did repudiate the terms, the plaintiff and others of the tenants made tenders to him of the \$400 down, which was the payment provided for in the archbishop's answer to the tenants, and demanded a deed before the expiration of the terms of the lease. Bickett refused to receive the money or make a deed, insisting on the terms of his own proposition, which increased the purchase money, required a larger cash payment, and gave but four years to pay balance of purchase money. It also appeared that the plaintiff was able, willing, and ready to comply with all the terms of the alleged contract contained in the archbishop's letter.

The court below found all the issues of law and fact for the plaintiff White, and decreed accordingly; this proceeding is prosecuted to reverse that judgment.

Several errors are assigned, but we suppose only those argued are insisted upon. There is one principal question which controls the case as presented to us:

Is there here a valid contract, binding between the parties, and one which equity will enforce?

It is objected that these tenants accepted the archbishop

as the responsible party during the time subsequent to his conveyance to Bickett, and that, though acting as the agent of Bickett, in the matter of the meeting and the contract, they elected to hold him, and can not now sue Bickett. This is a conclusion of fact we think not warranted by the testimony. These tenants simply looked to the influence of the archbishop with Bickett to carry out what on all sides was admitted to be just, and in what he did he in fact represented Bickett and was his agent thereunto duly authorized, though Bickett was present. The testimony clearly shows both before and at this meeting, and afterward, in all applications by these parties to the archbishop, they were continually remitted to Bickett. They dealt with him accordingly, negotiating with him and tendering him the money, and requiring deeds from him. This view disposes of the authorities cited to this point.

It is said that there is no such a thing in Ohio as the verbal acceptance of a proposition in writing signed by the party to be charged thereby, where it is otherwise unobjectionable; that in such a case there is no mutuality, and the case of *Ohio v. Baum*, 6 Ohio, 383, is cited in support of these propositions. But we do not think this case by any means supports the statement. On the contrary, we think that the resolutions passed at the meeting of the tenants, on the evening of February 14, accepting the terms of the archbishop's letter, in which the plaintiff participated, are sufficient to make this a good valid contract, which either party could enforce specifically, if otherwise there be no objection to it. (4 Kent's Com. 451; Fry on Specific Performance, sec. 181 *et seq.*, sec. 295; *National Insurance Company v. Loomis et al.*, 11 Paige, 431; *Fletcher v. Bulton*, 4 Comst. 396.)

Brown on Frauds, section 366, states that it was at one time doubted whether a memorandum of an agreement signed by one party only could be enforced against the other; "notwithstanding this doubt, however, the rule is firmly settled that in equity for obtaining a specific per-



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formance, as well as at law for recovering damages, the signature of the party making the engagement is all that the statute requires." In addition to the unqualified language of the statute itself, the plaintiff by filing his bill has made the remedy mutual. We consider it no longer an open question. See 3 Parsons on Contracts, 9, and cases cited. Indeed, in Ohio, if a parol contract for the purchase or sale of lands is admitted by the defendant, without relying on the statute of frauds for a defense, performance will be decreed. (*Anderson v. Harold*, 10 Ohio, 399; *Woods v. Dille*, 11 Ohio, 455.) Again, it is urged that when the archbishop wrote that letter, purporting to contain the terms of the agreement, that Bickett ought not to be bound by it, because he either did not understand it, or intend to make it, or was mistaken as to its real purport. But the evidence clearly negatives this idea.

We think this a sufficient memorandum in writing to charge Bickett and to authorize a decree of specific performance. The contract is complete in all essential respects. There is a valid description of the subject matter, the parties to the contract, the price and the terms, and nothing is left open to future negotiations. And there is nothing in the circumstances surrounding the parties at the time sufficient to authorize us to come to any different conclusion than that reached by the judge at Special Term.

The testimony sufficiently showed that the parties, including the plaintiff, were able, ready, and willing to comply with the contract, and that they made a tender, which perhaps, by itself, might be insufficient if the testimony did not clearly show also that Bickett refused to be bound at all by, or to recognize, the terms of the contract as set forth in the archbishop's letter, but insisted upon other and different terms. Under these circumstances, mere ability, willingness, and readiness to perform would be sufficient. Any tender of money made by the plaintiff would have been refused, if made according to the contract; and this is enough to render such a tender unnecessary. The law

does not require a party to do a vain thing. (Fry on Specific Performance, sec. 619; *Isham v. Greenham*, 1 Handy, 855.) Besides, there seemed a design on the part of Bickett to avoid giving the plaintiff an opportunity to make a tender, and it is too late now to object on his part that no tender was made. (*Gilman v. Holt*, 4 Pick. 258; *Southworth v. Smith*, 7 Cush. 891.)

Some stress, at the argument, was laid on the clause in the archbishop's letter which allows purchasers from six to ten years, at six per cent., who pay down \$400. We think the fair construction of this clause, as in any other alternative obligation, gives to the plaintiff his election, which he has made, to take ten years to pay the balance of the purchase money in; and that it is meant that the payment may be in equal annual amounts with interest. (2 Parsons on Contracts 657, and notes; *Layton v. Pearce*, 1 Douglas, 16; *Choice v. Mosely*, 1 Bailey, 186; *McNott v. Clark*, 7 Johns. 465; *Smith v. Sanborn*, 11 Johns. 58; *Small et al. v. Quincy et al.*, 4 Greenl. 497.)

Inasmuch as nothing was said in the contract about a deed or mortgage, the judge at Special Term did not require a mortgage to be executed for the deferred payments, nor a deed to be executed until all the payments were made; but allowed the title to stand in Bickett by way of security to him.

On the whole case, the judgment of the court below will be affirmed.

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THOMAS WILLIAMS, Plaintiff, v. JOB STEVENS, Defendant.

The report of a master commissioner, under the Code, is liable to be reviewed on exceptions, "and confirmed, modified, or set aside" by the court, in the same manner and to the same extent as was the report of a master in chancery before the Code; it does not stand upon the same footing with the verdict of a jury or finding of a referee in a proceeding at law, to be set aside only on a showing which would warrant the setting aside of a verdict of a jury rendered in a trial at law.

This case was reserved on a motion to confirm the report of a master commissioner, for the purpose of determining, not whether this report shall be confirmed, but to determine the principle upon which the court shall proceed in deciding whether it shall be confirmed or set aside.

The pleadings of the case show that it grew out of partnership transactions, and sought an account. It was properly an equity case, in which the court had jurisdiction to refer the issues of fact to a master commissioner without the consent of the parties. The reference was made without the consent of the defendant. The master took a large amount of testimony, and reported it with his findings of fact and law.

In the order of reference, he was directed "to find the facts between the parties, and, so far as he might find that the parties were entitled to have an account stated, if at all, to state the account between them, and, so far as he might find a settlement of accounts to have been made between the parties, if at all, to find as to what items thereof, if any, either party might be entitled, to open said settlement and have the accounts corrected; and of his findings and rulings, together with the evidence adduced before him, to make due return to the court," "in accordance with the supplementary act passed April 18, 1867," requiring the report of the evidence on referred cases.

*Stallo & Kittredge*, for plaintiff.

*Caldwell, Coppock & Caldwell*, for defendant.

Taft, J. Our opinion is not asked in the direct question, whether this report shall be confirmed, or set aside, or modified, but we are asked to say what weight is to be accorded to it, by the court at Special Term, as a report of a master commissioner under such a reference? On the one side, it is claimed that it is to be regarded as of the same binding force as the finding of a jury; on the other,

that it is to be reviewed, of course, by the court, and modified, set aside, or confirmed, as the court may decree correct, on its own independent and original examination, assisted, but not controlled by it.

By section 281 of the Code, issues may be referred, by consent of parties, to *referees* in all cases; and by section 282, they may be referred, without consent, in cases in which the parties are not entitled by the constitution to a trial by jury; and by section 283, the manner of trial is provided, and the report is declared to have "the effect of a special verdict," and that "the report of the referee upon the whole issue stands as the decision of the court, and that judgment may be entered thereon in the same manner as if the action had been tried by the court."

As to the effect of the findings of referees, we can not doubt the correctness of the opinion of this court in the case of *The Wesleyan Cemetery v. Woodruff*, 2 Disney, 216, announced by Judge Storer, "that referees, when appointed under the Code, possess judicial functions; that the authority conferred is to hear and determine the cause;" that, "with the exception of the power to render judgment and issue execution, it would seem the referees possessed all the authority of the court who appointed them to hear and decide upon the matters submitted." And the Supreme Court, in *Lawson v. Bissell*, 7 Ohio St. 132, 133, hold to the same construction of the functions of a referee under the Code.

The Code, as originally passed, made no express provision as to the powers of master commissioners, but only authorized their appointment by the court under section 611 of the Code. But as amended by the act of March 30, 1868 (S. & S. 573), this section 611 provides, "that the court may, upon motion of either of the parties, refer any action, in which the parties are not entitled to demand a trial by jury, to a regular or special master commissioner, to take testimony in writing, and report the same to the court, with his conclusions on the law and facts involved

in the issues, which report may be excepted to by the parties, and confirmed, modified, or set aside by the court."

This language is different from that used in section 283 of the Code, in regard to referees, which declares "that when the reference is, to report the facts, the report has the effect of a special verdict;" and that "the report of the referees upon *the whole issue* stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court."

The construction we put upon the office of master commissioner, under these statutes, is that he is to be regarded as a master commissioner in chancery, whose report is subject to be reviewed by the court which has appointed him, upon exceptions properly taken, and that his findings, like the findings of a jury upon issues out of chancery, are to inform and assist, but not necessarily to control, the judgment of the court; that the report of such master "may be excepted to by the parties, and confirmed, modified, or set aside by the court," as it shall deem equitable and just.

Practically, the effect of a report of a master commissioner upon the mind of the court may not, in a majority of cases, be very different from that of the finding of a referee in a legal reference. But where the court acts upon a master's report, it is to be regarded as declaring its own conclusions of fact and law; while in acting upon the report of a referee, at least in a legal matter, it is to be regarded as rendering its judgment upon the facts found by the referee, as it would do upon the finding of a jury. Theoretically, therefore, the responsibility of the judge is greater in the case of a master's report, than in that of a referee.

**LAWRENCE, Plaintiff, v. THE PENDLETON STREET RAILROAD  
COMPANY, Defendant.**

It is not actionable want of care in a driver of a horse car along a street to fail to prevent a horse from approaching, unseen by him, the side of the car, after the front part of the car has passed, so as to receive injuries from the rear wheel of the car on that side.

Where the driver, standing on the front platform of such car, keeps a close watch forward, and is vigilant to see and avoid obstructions near or approaching the track, he is not guilty of negligence in omitting also to keep a constant watch of each side of the car to the rear of the front platform, to see that no one is injured by coming laterally into collision with the side or the rear wheels of the car. But if, as the car is passing, the driver sees a horse loose in the street, dangerously near to and approaching the track backward, retreating from a boy who is endeavoring to get control of him, it is his duty to stop the car, and if he goes on and the horse is injured by the rear wheel of the car, the company would be liable unless the plaintiff has been guilty of contributory negligence; and in such a case it is a question for the jury to decide whose negligence actually caused the injury

This was a suit for damages to the plaintiff's horse through negligence of the defendant's agents. The accident happened on Fifth street, east of Main. The forward wheels of the car had passed, and the horse backed against the car, and placed his foot on the track in front of the hind wheel, and was injured. There was testimony that the boy, who was trying to catch the horse, called to the driver to stop, but that the car did not stop. There were two men on the platform beside the driver, and they were conversing. The driver did not hear the cry to stop before the horse was hurt. It was near the horse auction, and he may have heard the cry and supposed it was the noise about the horse auction. He saw the horse before he passed him, and says that the horse was out of the shafts and loose; that the space between the wagon and the car was sufficient for a carriage to pass; that he saw the boy reaching up to the horse's head to take hold of

him, and the horse was backing, and afterward heard the noise of the rear wheel running over the horse's foot.

It turned out that the horse was so injured as to be useless, and was afterward killed. The jury found for the plaintiff, and gave him a verdict of one hundred and seventy-five dollars, the value of the horse.

The boy in charge of the horse was a lad of about thirteen years of age, and was shown to be a careful boy.

A motion for a new trial was overruled and judgment rendered on the verdict, and the case is here on a petition in error.

*Forrest & Lindemann*, for plaintiff.

*Geo. E. & Wm. H. Pugh*, for defendant.

TART, J. The question of negligence in cases of this kind, though a question of fact, is often a nice one, and difficult to determine. The care of a driver of a street car is due mainly to his horses and to what can be seen in front without looking back; so that if he keeps a close watch forward, and is vigilant to see and avoid any obstruction on or near the track in front of him, he can not, ordinarily, be held guilty of negligence, if he omits to keep a constant watch of each side of the car to the rear of the front platform and the forward wheels, to see that no person or animal is injured by coming laterally into collision with the side or rear wheels of the car. This was the doctrine of the recent case of *Bulger v. The Albany Railway*, 42 New York, 459; which was the case of a child of tender years injured by approaching the street car from the side unseen, and falling under the rear wheel of the car on that side. But if he saw that the animal was loose, and was running or backing into the danger of getting under the rear wheel, it would undoubtedly be his duty to stop. Ordinarily, also, we should regard it as negligence, on the part of the owner of a horse, to leave

him loose on the street, liable to be run against by the cars. But this horse was in charge of a boy, and we are not able to say, positively, that the boy was guilty of carelessness in letting the horse get beyond his control just at that time; or that the owner was guilty of want of ordinary care by leaving the boy in charge of the horse. These all seem to be questions for the jury, as well as the question whether the driver of the car was guilty of negligence in not stopping when he saw the horse loose and the boy trying to get him under control, while the horse was backing toward the car.

If the case had been submitted to our judgment upon the evidence just as we find it reported in the bill of exceptions, we might, possibly, have found for the defendant, on the ground that the evidence did not satisfy us that the injury was caused by the negligence of the agents of the defendant, without the contributing negligence of the plaintiff or his agent. But it is a case of weighing testimony, in which we can not say with confidence which party is right. Here are circumstances favoring both theories of the case. The jury have weighed these circumstances, and it was their province to do so, and they have found for the plaintiff. We do not regard it as a case in which we ought to interfere with the finding of the jury.

It is not claimed that there were errors on the part of the judge before whom the case was tried, except in refusing to grant the motion for a new trial, and we can not say that there was error in that.



WILLIAM SCULLY, Plaintiff, v. THE CITY OF CINCINNATI,  
Defendant.

Where a city grades and paves a part of a street thirty feet in width along and within its corporation line, and an incorporated village adjoining said city at the same time grades and paves a part of a street thirty feet in width along and outside of said corporation line, but within the jurisdiction of said incorporated village, the two parts forming what is known to the public as one entire street sixty feet in width:

*Held*, that by the act passed February 21, 1866 (S. & S. 803), the city has the power to make such improvement within the corporation line of said city, and to make assessments therefor upon property within the city abutting on said part of a street;

That the fact that the assessment made by the two corporations are different in amount, but are uniform on the property within the jurisdiction of each, does not affect their validity, provided that no abuse of power is shown.

The cases of *Scully v. Wayne*, *Scully v. Miller*, and *Scully v. Serrian* were before the General Term about a year ago, when demurrers to the petitions were sustained, and the causes sent back to Special Term for further proceedings; amended petitions were filed, and demurrers sustained to them. The causes were consolidated, and the plaintiff then filed a supplemental petition against the city of Cincinnati, who answered. The plaintiff demurred generally to this answer, and this demurrer was reserved to General Term.

The supplemental petition sets out the several ordinances to establish the grade of McMillan street from Vine to Milk street, to grade and pave said street between the points mentioned, and the contract, and avers that the city had no jurisdiction over said McMillan street at the time of the passage of these ordinances and of making the contract, and that these acts were, therefore, void. It appears that the north half of said McMillan street was in the jurisdiction of the incorporated village

of Walnut Hills, Mount Auburn, and Clintonville, the respective corporation lines of the city and the village running along the middle of McMillan street, east and west; and that at the same time the work on the south half of McMillan street was being done under these ordinances, the incorporated village aforesaid was doing the work on the north half of the said street.

The supplemental petition further alleges, that the plaintiff did the work according to his contract, and on the 19th November, 1869, the city council passed an ordinance assessing \$8.789½ per front foot on the *south* side of McMillan street to pay for the improvement, which he avers is inconsistent with all the other ordinances passed by the city council above referred to, because they related to the *whole* of McMillan street, and therefore said assessment is void for uncertainty.

The supplemental petition also avers that the city attempted to construct said street in conjunction or partnership with said incorporated village, which the city had no legal authority to do; that the city permitted said incorporated village to assess the owners of property abutting on the north side of said street but \$7.7484 per front foot to pay for said improvement; and that the assessment on both sides of the street is not uniform, and is, so far as the city is concerned, contrary to law. He alleges that the city did not render to him a legal assessment, but that having done the work at the request of the city, she is bound for it, and asks judgment.

To this the city answers, admitting the ordinances, but denies that they are inconsistent, and insists that the assessment is legal and valid. She avers that McMillan street, in the city of Cincinnati, is only thirty feet wide; that the north line of said street was, at the time, the boundary line of the city; and that on the north line, immediately adjoining the same, but in said incorporated village, was *another* thirty foot street, which also bore the same name. She denies that she attempted to construct

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said street in copartnership with said village; but that each corporation acted with reference to the street called McMillan street, as known to and controlled by it, and that the two streets together form what is known to the public as McMillan street; and she avers that the assessment for which the plaintiff sues is for the work done inside the city, and is upon property over which she has jurisdiction, and the same is valid and binding.

For a second defense, the city alleges that if said ordinances and contract are void, there is no liability which can be enforced against her.

*I. J. Miller*, for plaintiff.

*Walker & Conner*, for defendant.

HAGANS, J. If it be true that these ordinances and the contract with plaintiff to do this work are void, the case would be one of assumpsit, on which, if plaintiff could recover at all, he would stand upon a *quantum meruit*. Whether the city would be liable in such a case, we do not consider it necessary to decide. Can, then, the city pass such ordinances as appear in this case, contract to do the work as has been done, and make a valid assessment?

When these causes were before us at a former term of this court, the question presented on the pleadings was, whether the improvement of McMillan street, as well without as within the city limits, could be done by the city, and the cost thereof assessed upon the property abutting on that side of the street only within the city; and we held that this could not be done.

This cause now presents other and different questions.

This work was done under the act of February 21, 1866 (S. & S. 808), which recites: "That where it shall be deemed necessary by any municipal corporation to improve any street, alley, or public highway, or any part thereof, within the limits of such corporation, by grading,

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paving, draining or other improvements, and, for the purpose of defraying the expense thereof, to assess and collect a charge or tax on the owner or owners of any lots or lands, or on the lots or lands, *by* or through which such street, alley, or public highway, or the part thereof to be improved, shall pass, \* \* \* \* \* the said council may, as soon as practicable, by ordinance, levy and assess a tax to defray all expenses consequent on such improvement, on the owner or owners of lots or lands, or on the lot or land *by* or through which such street, alley, or public highway shall pass, according to the true intent and meaning of this section, either by the foot front of the lots or lands bounding and abutting thereon," etc.

Now, the south half of McMillan street is "*part of a street.*" The law says, "*any part of a street;*" and we see no sufficient reason to hold that this language is intended to embrace only a section of a whole street and is not broad enough to include the very work done in the case at bar. And the corporate authorities have the right to impose assessments upon the property within the limits of the city, subject only to such restrictions as are imposed by the legislature to prevent an abuse of the exercise of such right. There is no evidence that there has been here any abuse of power in laying this assessment. It is strictly within the charter, as it is levied, *in fact*, but for the work done on part of the street and upon the property "*by which it passes.*" And the assessment is uniform on the property within the corporate limits; and we do not feel authorized to inquire any farther as to what may have been done by any other corporation, with respect to another and totally different matter. There was no property outside the city limits abutting on this street, over which the city had jurisdiction, or upon which an assessment could be made under any circumstances.

But it is said a street is a unity; that it has sidewalks and gutters; and that these ordinances speak of a street, as such. To this it may be replied that the only McMil-

lan street known to the city was a street thirty feet wide; and the fact shown by the pleadings that another corporation had another McMillan street thirty feet wide, immediately adjoining, the two together making a sixty foot street with gutters and sidewalks, it may be presumed, on both sides of it, makes the unity spoken of, and affords a strong ground for upholding these proceedings. Besides, the acts of the parties show clearly what was meant. (*Ridenour v. Saffin*, 1 Handy, 476.) So that we are not bound to suppose that the ordinances expressly treat of a matter outside of the jurisdiction, and is, therefore, illegal and void.

Again, it is said that the ordinance to assess is a departure from, or is inconsistent with, the previous ordinances, because they treat of a street, and the ordinance of assessment treats of *one side of it only*, and therefore the assessment ordinance is irregular and void.

To this, it appears sufficient to answer that the assessment covers no more property than was ordered to be improved. In fact, they are identical. No other objection is made to it, and it will be presumed, as the allegations stand, that the city council has acted in the spirit of equality and justice until the proof should show otherwise.

The demurrer to the answer will be overruled.

We have been led to say thus much because it seemed necessary and desirable to determine the liability of the city in this action, as all the facts in the case appear in the pleadings. But the demurrer reaches to the petition, and in looking into it we find it fatally faulty.

The cause will, therefore, be remanded to Special Term for further proceedings, with leave to the plaintiff to file an amended petition against all other defendants.

BERNARD EISENMANN v. NICHOLAS &amp; ADOLPH THILL.

ADOLPH THILL v. NICHOLAS THILL ET AL.

Where several attachments were levied upon the property of an insolvent firm at different times, so that the later ones would take nothing by the writ, and one of the partners sues the other for the purchase money of an alleged previous sale, and procures the appointment of a receiver, and asks that the partnership property be worked up and sold, and the proceeds distributed *pro rata* among the creditors who are made defendants, served with process and are in default, the receiver having entered upon the discharge of his duty, and one of the later attaching creditors, a defendant, afterward institutes proceedings in bankruptcy to compel a *pro rata* distribution of the partnership effects, and the assignee interferes with the receiver, and attachments for contempt are served on said creditor and assignee:

*Held*, that the receiver has proper custody of the property for the preservation thereof, for the common benefit, and may proceed to administer the same under the instruction of the court according to his appointment, and that the hearing of the proceeding in contempt will be postponed till he is disturbed in the performance of his duties or the final hearing of the cause.

Eisenmann brought suit November 29, 1870, against N. & A. Thill, upon their promissory note for \$800, and on the same day sued out a writ of attachment against Nicholas Thill, alleging that before that time N. & A. Thill had dissolved partnership; that said Nicholas took all the partnership assets and assumed all the partnership liabilities, and had absconded with the intent to defraud his creditors. On the next day the attachment was levied on a tannery, which was appraised at \$6,222. On the 4th of February, 1871, Edward H. Kleinschmidt, assignee in bankruptcy, was made a party defendant, and made a motion to dissolve, the attachment having been levied within four months. On the hearing of this motion, it was agreed that on the 9th of January, 1871, N. & A. Thill were adjudged bankrupts by the district court of the United States, under proceed-

ings commenced on the 23d of December, 1870. The motion was reserved for hearing to this court.

On the 3d December, 1870, Adolph Thill filed his petition, in which he alleged the late partnership, its dissolution, the turning over all its assets to Nicholas, his assumption of the partnership liabilities, in consideration of which said Nicholas was to pay him \$2,000, and gave his note therefor, and the fact of his having absconded. He also alleged the fact that on the 29th and 30th of November, 1870, certain creditors of the firm, among whom were Eisenmann, and Meyer & Lockwood, whom he made parties defendants, had sued out attachments and levied on the partnership property of the late firm, and that if the same were sold thereunder it would be sacrificed and he would lose payment of his debt, and asks the appointment of a receiver, for the purpose of working up the stock on hand and selling it to the best advantage, and for the payment of the creditors *pro rata*. He asserts a vendor's lien and makes the attaching creditors parties. On the same day a receiver was appointed and qualified. He at once proceeded to take possession of the property under the order of this court, and commenced work and the expenditure of money and labor, and was commanded by the order of this court to sell some perishable property, which he did. Meyer & Lockwood were served with process December 8, 1870. On the 4th of January, 1871, the plaintiff, in this last action, filed a motion against Meyer & Lockwood to show cause why they should not be attached for contempt for interfering with the orders of this court by procuring a restraining order, in proceedings in bankruptcy, to be issued from the circuit court of the United States against the receiver, commanding him to refrain from selling or in any other manner interfering with the effects of N. & A. Thill until further ordered. And on the 20th of January, 1871, the receiver filed a report, in which he states he had contracted liabilities to about \$500, and was about to make additional outlays, when, on the 19th of January, 1871, by

virtue of proceedings in bankruptcy, instituted by Meyer & Lockwood, defendants, the marshal of the United States for the Southern District of Ohio demanded of him the surrender of the property, books, etc., in his hands as receiver of this court, which he refused, and asks the instruction of the court. And on the 21st of January, 1871, a rule to show cause why they should not be attached for contempt was issued against Meyer & Lockwood, and ordered to be issued against W. B. Thrall, United States marshal. On the 3d of February, 1871, motion was made to discharge this rule, and on the 4th of February, 1871, Meyer & Lockwood and Thrall filed an answer to the rule, setting up the beginning of the proceedings in bankruptcy by Meyer & Lockwood, on the 23d of December, 1870; that N. & A. Thill were adjudged bankrupts, January 9, 1871, and all the necessary steps which resulted in the due appointment of Kleinschmidt, as assignee of N. & A. Thill, on the 1st of February, 1871; the demand of the receiver of the 19th of January, 1871; that the attachments were levied within four months preceding the proceedings in bankruptcy, whereby they became dissolved and the appointment of the receiver vacated, and all the property of the firm became and was vested in the assignee. They denied any contempt of this court, Meyer & Lockwood saying that they merely asserted their rights under the bankrupt laws of the United States, and Thrall, that he merely acted in his official capacity. These facts were all agreed upon on the hearing of the motion to discharge the rule, and the same, together with the whole case was reserved for the determination of the General Term. It was agreed, in the argument, that Meyer & Lockwood's attachment, being subsequent in point of time to those of the other creditors, they merely resorted to the proceedings in bankruptcy to obtain a *pro rata* distribution of the assets of the bankrupts among all the creditors, and obtaining that, they preferred to refrain from further proceedings



in bankruptcy, and that the receiver should continue in possession and administer the estate accordingly.

*Forrest & Lindemann*, for plaintiff.

*Stallo & Kittredge*, for defendant.

HAGANS, J. An examination of the papers of the cause discloses the fact that the parties served with process are in default for demurrer or answer in the case of *A. Thill v. N. Thill et al.* Indeed, we gather that it is the desire of all the creditors that the receiver should continue in the possession of and administer the assets *pro rata*, as prayed for in Thill's petition, without further, or, indeed, any objection at all. There is nothing in the record to authorize us to inquire into the sufficiency of that proceeding. The plaintiff is interested in the partnership property, and has a right to see that it goes to the payment of the partnership debts. The fact is that a receiver of this court was appointed, as we are bound to suppose, according to the record, for sufficient reason and on sufficient grounds; and he has been acting under the orders of the court at a time when these parties were bound to know what was going on, and has not only disposed of some portions of these assets, but has incurred considerable liabilities for the common benefit. It would seem, therefore, that they are bound by his acts. He was appointed in their behalf and none of them move to discharge him. In fact, the court has the custody of this property for the purposes of the action, viz: a *pro rata* distribution of the assets, according to the prayer of the petition, at the instance of the plaintiff, who is one of the members of this insolvent firm, and who seeks to ascertain and recover what is due to him, if he be entitled to anything. No one objects to this course, though there are priorities among these attachments. On the contrary, there seems to be a voluntary assent to it.

The cause seems to stand, as to the propriety of this

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Eisenmann v. Thill.

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action upon the principle of *Skip v. Harwood*, 3 Atk. 530, and *Williamson v. Wilson*, 1 Bland (Md.), 418. Both of these cases were suits by one partner against another, and a receiver was appointed to preserve the partnership property for creditors. In the first of these cases, it was held by Lord Chancellor Hardwicke that a commission of bankruptcy could not supersede a decree for a receiver, the appointment of which is a discretionary power of as great utility as that of any other authority that belongs to a court.

And, in the case in Maryland, the court held that after a firm became insolvent, the partners are to be considered as trustees for the benefit of their creditors; and, therefore, a suit between such partners, for the preservation of the assets for creditors, may be treated as a creditor's suit, and the partnership estate collected and distributed accordingly; and a receiver was appointed to preserve the estate for equal distribution among the creditors.

Here, all the parties, even those who perhaps might claim priority by attachment, voluntarily submit to the administration of the insolvent's estate, according to our assignment laws. The purpose of the proceedings in bankruptcy is obtained, and their further prosecution seems unnecessary.

We do not dispose of the motion to discharge the rule or the motion to dissolve the attachments; we prefer to let them stand until the final hearing, and the receiver may go on and collect these assets for distribution *pro rata*. And if any of the parties disturb him in the performance of his duties, or if the assignee in bankruptcy interferes with him, he may report the facts for such further action as may be appropriate in the premises.

The cause will be remanded to Special Term for further proceedings.

THOMAS SHERLOCK ET AL. v. THE GLOBE INSURANCE COMPANY OF CINCINNATI.

Where a vessel is insured, negligence on the part of the officers in charge will not relieve the insurer from liability, unless their conduct has been fraudulent or barratrous.

It is well settled that in all cases of loss, in determining the liability of the underwriter, the proximate and not the remote cause is to be considered.

When a vessel is so injured as to cease to be of any value as a vessel, a total loss occurs, which fixes the liability of the insurer, even though there be no technical abandonment.

In the United States a constructive total loss occurs when the cost of repair would exceed half the value of the vessel.

The necessity of an abandonment may be constructively waived by the insurer.

A claim of total loss made to the insurer, and an unconditional refusal by the insurer to pay the loss, is equivalent to an abandonment.

Where the salvage of the wreck is not used for repairs, but in the construction of a new vessel, no claim by the insurer of one-third new for old will be allowed.

The non-compliance by the owners of a vessel with a statute prohibiting, under a pecuniary penalty, the carrying certain material without special license, can not affect the insurance on vessel or cargo.

The suit was brought upon a policy issued by the defendants on the 1st of May, 1868, insuring the plaintiffs as owners of the steamboat United States, against loss by fire, for the term of one year, the vessel having liberty to navigate the usual Western rivers.

She was insured in \$10,000, and the premium paid for the risk was \$500. It is alleged that while the boat was navigating the Ohio river between Cincinnati and Louisville, she was damaged by fire to the amount of \$126,442.50, the boat being valued at \$140,000, with the privilege of being insured in the sum of \$105,000.

The plaintiffs claim that in consequence of such loss the defendants are bound to pay to them \$9,081.60, for which sum they claim judgment.

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The defendants answer: 1st. Denying their liability generally. 2d. That the officer of the boat did not pursue the regulations adopted by the supervising inspectors under the acts of Congress; whereby, in disobeying the same, and not pursuing, in the navigation of the river, the mode required by such regulations, the damage sustained by the vessel insured occurred; and, therefore, by the willful act of the officers in this behalf, the insurers are discharged from any liability on their policy. 3d. That in consequence of the neglect of those navigating the boat, a collision occurred between her and the steamboat America, the one ascending and the other descending the river, by means whereof the America struck with great force and violence the United States, then laden with coal-oil, whisky, and other combustible materials, whereby the same became ignited by friction or by communication with the fires ordinarily burning upon the steamboat, and that all loss and damage to the United States were produced by the carelessness and negligence of the plaintiffs, their agents, and servants.

A fourth cause of defense is averred that the premium was not paid within the period required by the terms of the contract, and therefore the policy was void, but this cause was afterward withdrawn.

To this answer the plaintiffs replied generally, denying all the allegations of the defendants.

An additional answer was afterward filed by leave, which denied that the boat at the time of the loss was "river-worthy," as required by the policy; but, on the contrary, before and at the time of the alleged loss, oil of vitriol had been and was then carried on the boat as freight, contrary to the act of Congress in such case made and provided.

In reply to this additional answer, the plaintiffs denied that the allegations made therein were true.

The case at Special Term was tried by a jury. The evidence in the case was exceedingly voluminous, but in substance it appeared that on the night of the 4th of Decem-

ber, 1868, the steamboat *America* was ascending the Ohio river on her regular trip from Louisville to Cincinnati, and the steamboat *United States* was descending the Ohio river on her regular trip from Cincinnati to Louisville. Both these boats were owned by the plaintiffs. A collision occurred between them, and the *United States* immediately afterward took fire, burned to the water's edge, and sank. All the freight on board was lost, as no part of the boat was left but what the fire had in some way or other affected. The upper and lower decks were entirely burned off, the debris with the machinery being thrown into the open hull.

While in this situation the plaintiffs notified the defendants of the loss, and asked their advice as to what course should be pursued. They were answered that the defendants did not recognize any liability on their part for any portion of the loss, and declined to interfere or give advice upon the subject.

The wreck remained where it sank for several weeks, the defendants declining to interfere in the matter, or to give any advice or direction as to what the plaintiffs should do, always alleging that they could not be held liable upon their policy.

Being unable to make any arrangement with the underwriters, the plaintiffs then concluded to raise the broken fragments of the vessel; and after much labor and the expenditure of a large sum of money were enabled to float the hull, which was towed to Cincinnati and placed upon the marine railway, that it might be ascertained whether the boat could be repaired.

This, it was found, would result in the expenditure of more than the vessel would be worth after the reparation had been made, and the old materials were then appraised by competent mechanics, taken by the plaintiffs at their appraised value, and used, so far as they were proper for the purpose, in the construction of what was regarded as a new boat. During the rebuilding the defendants had daily

opportunity to know what the plaintiffs were doing, yet made no objection nor protested in any way against the course they were pursuing.

When the boat was finished, her original size in length, in height, and in the construction of her upper works, her cabin and general finish, were not preserved; but, as it was proved, another boat was produced at an expense of \$103,543—the actual value of the wreck first being deducted. It was then claimed upon the evidence in the case, as the boat was valued in the policy at \$140,000, the defendants were bound to indemnify the plaintiffs to the extent of one-fourteenth of the value of the vessel, which would have been, without deducting the salvage, \$10,000, but that being deducted, the plaintiffs asked to recover \$9,031  $\frac{49}{100}$  and costs.

There was no direct evidence of an abandonment, either formal or informal, by the plaintiffs to the defendants.

Before the jury, to whom the cause was submitted, had been charged by the judge, the plaintiffs' counsel asked several special instructions, which were given, but as they are all indicated in the general charge, we need not refer particularly to them.

The counsel for the defendants asked various instructions.

1 and 2. That the loss must have been proved to be the result of fire, that peril alone being insured against.

3. That if the collision produced the fire, the underwriters are excused.

The fourth was an abstract idea only, tracing the distinction between "efficient and predominating causes."

The fifth was but the same proposition in a different form, and so is the sixth, and we may also include the seventh in the same category.

8. The plaintiffs must have proved that they abandoned the boat to the underwriters in proper time, or they could not recover for a total loss, but only for such partial loss as it could be shown the vessel suffered by fire, and in such

case, if the vessel was repaired, the cost of repairing, deducting "one-third new from old," can be charged to the underwriters.

9. This charge was but the expression in greater minuteness of the propositions involved in the previous one.

These charges were all refused as asked, and the refusal of the judge to give them excepted to.

TART, J., charged the jury as follows:

This suit is upon a policy of insurance, by which the defendant "caused the plaintiffs to be insured in a sum not exceeding \$10,000, against *fire only*, upon the steamboat United States, with permission to navigate the usual Western rivers." By this policy the risk of collision is not covered. It is not strange that it should have been claimed for the defendant that, as this loss originated in the collision, it was not covered by the policy. It has been presented as a defense that the loss was by collision, and that the risk of collision, and of other perils of the river, are excepted by limiting the insurance to "*fire only*," and that as the risk of collision was excluded, a *fire* caused by the collision was also excluded. But I can not adopt this construction. Of all the risks to which a steamboat is exposed, fire is the only one covered by this policy. But there is no provision that the risk of fire caused by other perils of the river should be excluded.

If it had been the intention of the parties to exclude losses by fire caused by perils not covered by the policy, it is to be presumed that they would have expressed it. But it seems to me that such a construction would defeat the general and obvious object of procuring any insurance at all. All fires are caused by something, and on steamboats they are generally caused by something known, in the language of insurance, as perils of the river. If the losses from fire caused by perils of the river, or by other perils enumerated in this marine policy, are to be regarded as excluded, it would be very rare that a loss by fire to a

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steamboat on the river would not be excluded by such a construction, and the policy would be of very little value to the insured.

The language of the policy, in my opinion, does not require nor justify such a construction.

The construction which I put upon this policy, therefore, is that it insures the plaintiffs against fire from whatever cause, provided it be not caused by some of the perils which are excepted in the policy, of which collision is not one; so that, if you find that any part of this loss was caused by fire, it is not a defense that the fire was caused by the collision.

But the insurers are not responsible for the loss or damage caused by the collision *only*, and not by fire. The breakage of the bow of the United States by the America running into her, and cutting a hole and letting in the water and sinking her, was all the work of the collision, and not to be in any manner charged to the defendant.

As fire supervened and caused the loss for which this suit is brought, you will have the duty of finding what portion of the loss was caused by the collision directly, and what part was caused by the fire.

For the risk of collision proper, the plaintiffs themselves were responsible. As between them and the defendant, you may regard them, the plaintiffs, as insurers against collision.

This discrimination between the loss caused by the collision not through the agency of fire, and the loss caused by the fire, is not without difficulty; but the evidence is all before you on which to make it.

All the repairs, and all the cost of raising and placing the wreck in Cincinnati, fairly attributable to the collision, aside from the fire, must be carefully distinguished from the cost of repairs, raising, transportation, and care of the wreck, which is to be charged to the account of the fire.

But the question which has been contested as the main point in this case is, whether the amount of this loss is to



be ascertained by the rules applying to what is denominated a total loss, or by the rules applying to a partial loss.

A total loss may be actual or constructive. A constructive total loss is where the loss is not actually total, but is so great as to justify the insured in abandoning the subject of insurance, or what remains of it, to the insurers, and claiming a total loss.

It is usual for insured parties in cases of loss, whether actually or only constructively total, by abandonment, to surrender what remains of the boat to the underwriters.

This is a convenient way of making certain what, in many cases, would otherwise be uncertain. The surrender by abandonment of the wreck or salvage is so convenient and so generally adopted in such cases, that the question of an actual total loss without an abandonment arises comparatively seldom.

In the present case there has been no abandonment or sale of the part saved from the boat, but it has been used in rebuilding a new boat or in repairing the old one, and one question, perhaps I ought to say the question for the jury to determine, is, which of these two things has been done. Has a new boat been built, or an old one repaired?

As there was no abandonment of the property saved, no mere constructive total loss can be claimed. But if there was an actual total loss, the recovery may be as for a total loss, without any abandonment, crediting the defendants with the value of what was saved. It is claimed by the defendant that the plaintiffs have themselves settled the question in favor of a partial, instead of a total loss, by reconstructing upon the old hull a new cabin, new boilers and wheels, and wheel-houses, instead of abandoning the saved part to the insurers.

It is also claimed that the precedents on which the plaintiffs rely to establish the total character of the loss have all been cases in which the wrecked or injured vessel had been sold, and the circumstances having justified a sale, an

abandonment became useless, the sale under such circumstances having converted the salvage into money. It has been held in such cases that the abandonment of the money to the insurers, merely that they might repay it to the insured, would be an idle ceremony. This boat was at or near her home port, and was not sold after the disaster, nor abandoned to the insurers.

The case is peculiar, and must be considered and decided on its own circumstances.

The general object of an abandonment is to simplify the settlement of the loss, by making the agreed value in the policy the measure of damages, deducting the value of the salvage; while, if settled as a partial loss, the particular items of loss must be proven, and in case of repairs, the bills of items, or other proofs of the actual cost of the repairs, must be furnished; and after they are proved, there is a deduction, from the amount, of one-third new for old in cases of repairs. In the present case, the valuation in the policy is \$140,000. This was agreed upon by the parties to be her value for the time the policy had to run. This valuation binds both parties. All the policies on the steamer amounted to \$105,000, or three-fourths of the whole value, the other fourth being at the risk of the owners. The policy of the defendant was for ten thousand dollars, or one-fourteenth of the valuation. In a total loss with no salvage, the recovery would be one-fourteenth of the valuation, or \$10,000.

The plaintiffs claim that they have shown an actual total loss by fire, which is the only peril insured against, and that they are entitled to have the damages ascertained as a total loss, measuring the damages by the valuation in the policy with salvage, stating their loss as follows:

Assuming the entire loss, the valuation in the policy, \$140,000:

Deducting from this amount as salvage the value of all that was not destroyed by fire, consisting of the cost of

repairing the damage by collision, for which the plaintiffs themselves were responsible, amounting to \$6,000 :

And of the net value of the wreck when brought to Cincinnati, less one-half the cost of raising and bringing it here, viz: \$12,000 less \$2,971.25, the other half of that cost being attributable to the collision, \$9,028.75 :

Making the entire salvage to be credited to the insurers, and deducted from the agreed value, \$15,028.75 :

Leaving as the entire loss by fire \$124,972, one-fourteenth part of which, it is claimed, is to be paid by the defendant under this policy. The amount of the claim thus estimated as for a total loss under this policy, is \$9,028.75, with interest from April 1, 1869, to June 6, 1870—fourteen months and five days—\$639.54, making the amount due \$9,668.29. This is the plaintiffs' claim.

This statement illustrates the method of ascertaining what is denominated a total loss. The figures themselves, as well as the facts on which they are founded, are not given here as facts, but by way of illustration of the mode of calculating the loss as a total loss. If you should find a total loss, you will find the facts and figures for yourselves on the evidence. You will observe that in ascertaining this amount, the agreed value in the policy forms the basis of calculation. It is to avoid difficulty in ascertaining the actual value in the event of a total loss that the valuation is made when the policy is issued; and, unless fraudulent, which is not claimed in this case, it is binding on both parties.

The counsel for the defendant, on the other hand, claim that the loss is not actually total, and that as there has been no abandonment to the insurers of what remained after the disaster, it is to be ascertained as a partial loss.

By regarding the plaintiffs as having repaired  
the steamer United States at a cost, as shown  
by the statements of witnesses, and the bills  
and books, of.....\$103,543 97

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Subject, however, to deductions of \$7,080 for  
 expense of repairs attributable to the collision  
 as well as of other items, which I need not  
 enumerate, but which all together amount  
 to ..... \$10,191 29

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Leaving as net cost of repairs caused by the fire \$93,352 68  
 Deducting one-third as the difference between  
 new and old materials..... 31,114 23

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Making the entire loss..... \$62,238 45  
 One-fourteenth of this to be borne by the de-  
 fendants, which, with interest, is said to  
 amount to ..... \$4,694 60

Thus, in the peculiar circumstances of this case, the  
 entire loss is \$124,972 or \$62,238.45, and the defendant's  
 share of it is \$9,668.29 or \$4,694.60, as you calculate it by  
 the rules of a total, or of a partial loss, or nearly in those  
 proportions.

And the difference in the amount of loss upon the single  
 risk of the defendant, made by these different modes of  
 casting it, is \$4,950.22, or one is about double that of the  
 other. Both are intended to effect the same object, viz:  
 the indemnity of the insured.

I do not vouch for the accuracy of these figures, al-  
 though they are probably not far from correct. But the  
 responsibility of making the calculations for yourselves I  
 leave with you, where it belongs.

But these statements illustrate the two modes of ascer-  
 taining the amount of a loss, and show you the precise  
 nature of the controversy, as well as the importance of the  
 question you have to decide.

It is claimed by the counsel for the plaintiffs that the  
 United States received a comparatively small damage by  
 collision, which could have been easily repaired for a small  
 sum compared with her value, and that the collision was

immediately followed by fire, which totally destroyed the boat for the purposes and uses of a steamboat, so that the United States steamer no longer existed as a steamer, and to repair the damage done by fire to the boat would require a cost greater than the value of the steamer when wholly repaired, or rebuilt in the form and style in which she existed before the accident.

The defendant's counsel, on the other hand, claim that the United States was not wholly destroyed in the sense claimed by the plaintiffs, nor in any sense; that she could have been repaired, and was repaired by the plaintiffs themselves in the form and manner which they preferred, and that the cost of said repairs, so far as attributable to the loss by fire, did not exceed \$93,352.68, from which, by the terms of the policy, they are entitled to have one-third deducted as the agreed difference between the new and old materials. If the steamboat was a proper subject of repair, retaining her identity as a steamboat, and in such a condition that a prudent uninsured owner would have repaired her, the rule of recovery would be as for a partial loss.

The rule by which to determine in what cases the indemnity is to be ascertained on the principle of a total loss, and in what cases it is to be ascertained on the principle of a partial loss, has been the subject of earnest discussion in many cases, and of various, if not contradictory, opinions, both in America and in England, from which country we derive many of the doctrines of insurance law. It has also been very much and ably discussed in this case.

I have said that cases of actual total loss, without abandonment, arise comparatively seldom. Nevertheless, in the vast number and variety of insurance cases which have arisen and been recorded in the reports of English and American judicial proceedings, there have been several cases of what is denominated actual as distinguished from constructive total losses, without any notice of aban-

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donment, where the ship or the wreck has been sold by the captain, under various circumstances.

Several cases have arisen in which a ship, on a foreign coast or in a foreign port, has been reduced by perils insured against to a condition from which she could not be recovered and repaired without incurring an expense greater than her repaired value, in which condition a prudent uninsured owner would not attempt to repair, and the captain has, as the best course for all concerned, sold her for a small value, and the owners have sued for a total loss, without giving notice of an abandonment. In this class of cases the inquiry has generally been, whether the ship, under the circumstances of each case, was capable of repair at all, or if she could be repaired, whether the cost would exceed her repaired value; and if so, her repairs have been held to be impracticable and the sale justified, and the recovery has been permitted for an actual total loss, without any notice of abandonment, crediting the insurers with the proceeds of the sale.

These cases have generally, if not universally, arisen upon losses which have happened away from the home port, and where the cost of repair has been enhanced by the absence of facilities for making repairs, or for recovering a ship from her perils; in those cases, however, the question has been considered one of actual total loss, and the insured has been charged with the proceeds of the sale of the wreck.

No case has been cited from the books where a steamboat has suffered a disaster at or near her home port, and remained in form a steamboat, and where the wreck has not been sold nor abandoned to the underwriters, and the insured have recovered as for total loss on the ground that to repair her would cost more than her repaired value. But the cases to which I have referred have generally, if not in every instance, gone upon the idea that a total loss must exist to justify the sale.

The circumstances of this case are peculiar. The ques-

tion whether the cost of repairs would exceed the repaired value could not ordinarily arise in a home port, where repairs could be most advantageously made, and where what was saved would be safe. The circumstances, as claimed to exist in the present case, are peculiar in this, that by the change in the trade to which she was destined the original form and style of the "United States" had become exceptional, and to restore it by repair or reconstruction, it is claimed, would cost more than she would be worth when so repaired or reconstructed.

Now, it is not necessary that I should detail the difficulties I have found in analyzing and comparing the authorities on this subject, or in the application of the principles of the decided cases to the evidence in the present case. I may, however, in general, remark that, while I find no decided case precisely like the present, in which the fact that the cost of repair would exceed the repaired value has been held to entitle the insured to recover for a total loss without abandonment, it does appear to me that the principles of the decisions to which I have referred logically applied to the facts of this case, as the plaintiffs claim them to be, would make it a case of actual total loss. That is to say, if the jury should find that this steamboat did remain *in specie*, but was so badly damaged *by fire* that to repair that damage would cost more than she would be worth when fully repaired both as to the damage by fire and collision, the repairs of the damage by fire must be considered as impracticable, and the loss actually total, without abandonment.

The loss by collision is to be regarded between the plaintiffs and defendants as so much saved, so that the amount of the cost of repairing the damage done by fire, after the damage by collision has been repaired by the plaintiffs, must exceed the value of the entire boat when repaired; and if that fact is found by the jury, they will ascertain the damage on the principle of a total loss, crediting the defendants with the cost of repairs attribu-

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table to the collision and with the net value of the wreck.

The total loss of a steamboat, contemplated as a subject of insurance, does not mean the annihilation of the timbers and iron of which it is composed; nor does it necessarily mean the destruction of their value as materials for building another boat, or for other purposes. But it does mean the entire destruction of the steamboat as a steamboat, for the uses and purposes of the steamboat insured. This may happen by sinking her in the sea beyond hope of recovery; by reducing her to ashes; by reducing her to a condition in which she can not be repaired at all, or in which the cost of repair would exceed her value when repaired, so that a prudent uninsured owner would not attempt to repair, as it would only increase the loss; in either of which conditions, if caused by a risk insured against, as in the present case, by fire, it is to be regarded as an actual total loss of the steamer, within the meaning of the policy.

And if you should find from the evidence in this case, that the steamboat United States insured by this policy was thus totally destroyed by fire, for the purposes and uses of the insured steamboat, you will proceed to ascertain the amount of the loss on the principle of a total loss.

But if you find that the steamboat was not an actual total loss by fire, in the sense I have explained—that she survived the fire, and could have been repaired of all damage by fire at a cost not exceeding her value when fully repaired—you will proceed to ascertain the damage by fire on the principle of a partial loss.

Intimately connected with this question, and preliminary to it, is another also peculiar to this case: What is to be comprehended under the term repairs of the steamer United States? The plaintiffs claim that it is the restoration of the United States, with her two cabins and furniture in all respects as she was before the accident; and



that the cost of replacing both cabins is to be included in the estimate of the cost of repairs in determining whether her repairs would cost more than she would be worth when repaired.

The counsel for the defendants, on the other hand, say that she has been repaired by the plaintiffs in the way they preferred, and is worth as much as she would have been with both cabins replaced, and that the cost of this repair, reduced by deducting that part which is attributable to the collision, furnishes the criterion by which you are to decide whether the cost of repairs caused by the fire, exceeds the repaired value.

To illustrate this difference by figures: If to restore the United States to her old form, with both cabins, would cost, in addition to the repairs due to the collision, \$130,000, or any sum less than the \$130,000, that would make a case of total loss, on the plaintiffs' hypothesis, that the repair of the United States must be taken to be restoring her to her former condition. On the other hand, if the steamer has been repaired, as the defendants' counsel claim, at a cost for damage due to the fire of about \$98,000, and the repaired boat was worth, when repaired, \$100,000, or any sum above the cost of repairs due to the fire, it would be a case of partial loss, on the hypothesis of the defendant's counsel, that the plaintiffs have actually repaired the insured steamer.

This is a question of fact for you to determine from the evidence. Whether what has been done under all the circumstances constitutes a repair of the steamer United States, or the building of another and different boat, is a question for you to determine. You have heard all the testimony. I have allowed or intended to allow all the evidence tending to sustain both theories to be presented to you, that you might have before you the means of forming a fair and just opinion.

The counsel for each party have insisted that the court should decide this question, by excluding evidence off red

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to support the theory of the other party as to what constituted repairs to the steamer United States. But it has seemed to me that it is a practical question of fact which the Court can not safely undertake to decide. I have concluded, therefore, to leave it to you, upon all the evidence, and under all the circumstances, what was a fair estimate of the repairs of the steamer United States, made necessary by the fire, excluding the cost of those which were attributable to the collision, if she could be repaired; and whether such repairs would have cost, or did cost, more than the value of the boat when fully repaired.

You will find it convenient to settle this last question first, as preliminary to the great question, whether the case is one of a total, or a partial loss.

To portions of this charge the defendants excepted; and afterward presented other and further instructions to the Court, which were given.

A verdict was rendered for the plaintiffs for \$9,558.62, and the defendants moved for a new trial alleging the verdict was against the law of the case and the evidence also.

The questions involved in this motion were reserved for opinion of the court in General Term.

*Stanley Matthews, George Hoadly, and Lincoln, Smith, Warnock & Stephens, for plaintiffs.*

*Wm. Y. Gholson, George E. Pugh, George H. Pendleton, and Burnett, Follett & Wright, contra.*

STORER, J. A careful examination of the pleadings, and the evidence contained in six hundred pages of the bill of exceptions, presents these questions for our decision:

*First.* Was the loss of the vessel caused by the peril against which she was insured?

*Second.* Was the loss a total one absolutely or constructively total only?

*Third.* Was the vessel rebuilt, resulting in a new and different structure, or was she simply repaired, subjecting her to the deduction of one-third new for old, in the adjustment of the loss?

*Fourth.* Was the policy forfeited by a disobedience of any laws of the United States, forbidding certain species of merchandise from being carried on the vessel without a license?

There is no denial in the answer that the loss was the consequence of fire, although it is alleged the flames which consumed the vessel were produced by the contact of the America with some packages of aqua fortis on board the United States, which the plaintiffs were prohibited from transporting on their vessel by the act of Congress of August 30, 1832. 10 Statutes at Large, sec. 46, p. 63.

It is immaterial how the fire was produced, whether by mere accident or the negligence even of the officers of the vessel, if there has been no fraudulent or barratrous conduct on their part to which the loss may fairly be attributed. This rule we regard as authoritatively settled, and another rule also, that in all cases of loss within the perils insured against, the proximate, not the remote cause of the injury, is to be regarded in determining the liability of the underwriter. 2 Arnould on Ins., 8d ed. 670; *Busk v. Royal Exchange Co.*, 2 B. & Ald. 73; *Walker v. Maitland*, 5 Ib. 171. These cases have established the law in England, and have been approved by numerous subsequent decisions.

This also is the law as we find it recognized by our own courts. *Columbia Ins. Co. v. Lawrence*, 10 Pet. 517; *Waters v. Merchants' Ins. Co.*, 11 Pet. 215; *Perrin v. Protection Ins. Co.*, 11 Ohio, 147. See also 2 Phillips on Ins. 1032.

If we apply these principles to the evidence we find in the record, we are satisfied the loss of the vessel was caused by the direct peril against which the plaintiffs were insured, and no fraud can be imputed to the plaintiffs in producing it.

The jury might well have found as they did, and we think upon this point their verdict ought not to be disturbed.

*Second.* Was the loss a total one, or merely constructively total, which requires, on the part of the insurers, a formal abandonment to the underwriters?

When the vessel founders at sea, or is so broken up by being wrecked that it is obvious the subject insured ceases to be of any value as a vessel, although some of the planks may remain, we may regard the liability of the insurers is fixed, though there be no abandonment. The circumstances of each case must therefore determine the extent of the loss. This doctrine is very clearly stated and explained by Lord Abinger, in *Rowe v. Salvador*, 3 Bingham N. C. 266, in the Exchequer Chamber, in a most exhaustive examination of the question. See also the case of *Cambridge v. Anderton*, first reported in Ryan & Moody, 61, at Nisi Prius, afterward in the King's Bench, 3 Bingham N. C. 203, and 2 B. & C. 691; see also *Gardner v. Salvador*, 1 Moody & R. 116.

An abandonment is but the formal cession of what may become salvage, when the vessel that has suffered from the peril against which the owners have been insured is yet susceptible of repair, and only confers the same right the insurers would have had by subrogation on payment of the sum insured. Meanwhile the master of the vessel, up to the time of the abandonment, is the agent both of the insured and the insurer; if the offer to abandon is accepted or refused, he is the agent of the underwriter only.

We understand a constructive total loss, as the law now exists, both in England and the United States, takes place, to use the language of 2 Arnould, 850, "where the subject insured is not destroyed, but its destruction is made highly probable, and its recovery, though not utterly hopeless, is either exceedingly doubtful or too expensive to warrant the attempt; or where the vessel could not be made navigable, except at a cost greater than her repaired value."

2 Arnould, 955. The application of the rule thus stated is extended in the United States to those cases where the cost of repairs will exceed half the value of the vessel. *Peele v. Merchant Ins. Co.*, Cr. 3, Mason, 27; *Bradlie v. Maryland Ins. Co.*, 12 Peters, 278.

It seems to be admitted by all the writers upon marine insurance, that in every case of a constructive total loss, there must be, as a general rule, evidence of an abandonment by the owners to the insurers.

But if the claim of the defendants should have been sustained as to the extent of the loss, it is settled in every such case that circumstances may exist which will excuse what might otherwise have been the duty of the insured to prove. Now, in the case before us, while there is a denial in the answer of any loss under the policy, there is no allegation of the constructive loss, or of a neglect to abandon, or even of any loss total or partial; but we have no doubt under the averment of a total loss it may be proved to have been a constructive total loss only, and we notice this fact merely to warrant the belief that the insurers did not intend to admit their liability in any event.

The contract of insurance is said to require the utmost good faith of all the parties interested. "*Uberrima fides*" is the maxim which the writers on this branch of the law have applied to the insured as well as to the underwriter. The acts of either may estop them, if inconsistent with fair dealing, and this is the same rule we always recognize where one party to a contract has so demeaned himself toward the other that he has been led to believe certain facts have thereby existed, and has acted on this presumption, there may well be an estoppel "*in pais*."

It is on this principle the law will never require a vain thing to be done, if it can be fairly inferred the performance of an agreement has been waived.

Hence it is preliminary proof of loss is always required to be given in every suit upon a policy of insurance unless it is waived. This may be by an absolute refusal to pay the

loss, or the silence of the insurers and other acts from which it may be implied the proof would not be demanded. 2 Phillips, §§ 1812, 1813, where the cases are collected. And we see no reason why we may not extend the principle to the waiver of an abandonment; the one is equally the right of the underwriters to require as the other. Mr. Arnould, vol. 2, p. 888, admits the rule where he says: "And so *e converso*, in a case where the insured would be entitled otherwise to notice of abandonment, the underwriters by their own conduct may forfeit their right to insist upon it." See also the opinions of Buller and Ashurst, JJ., in *Da Costa v. Newham*, 2 T. R. 407.

If, then, notice of an abandonment was necessary, the conduct of the underwriters, when applied to for an adjustment of the loss, was such as to waive the right to require it. The claim when made to the defendants was for a total loss, and it was held by Judge Johnston, in *Patapasco Ins. Co. v. Southgate*, 5 Pet. 604, that such a claim was equivalent to an abandonment, and the case of *Cassidy v. La. State Ins. Co.*, 18 Martin, 421, is to the same effect. 2 Parsons on Ins. 172-176; *Twynng v. Washington Ins. Co.*, 10 Gray, 443; *Portsmouth Ins. Co. v. Brazee*, 17 Ohio, 81.

The instructions asked of the judge as to the application of the rule one-third new for old were properly refused, but in his general charge he stated the law very fully as we understand it.

No underwriter can claim the deduction where no repairs as such have been made, and where the salvage is appropriated to build a new vessel, the idea of repair can not be entertained, else an anchor or boat or some portion only of the wreck may be saved, and if used on a new vessel, it might, with the same justice, demand the rigid application of the doctrine in the adjustment of a loss. If the defendants have received the full value of the salvage, in a credit of the amount in the policy, they have obtained all the benefit they could derive, if they had undertaken to raise the vessel themselves, as it is evident they would

not have succeeded better than the plaintiffs in reconstructing her, as they must necessarily have expended a hundred thousand dollars in the operation.

Another ground of defense set up in the answer was the alleged unseaworthiness of the *United States*, by the non-compliance of the owners with sections 45 and 46 of the law of Congress, 10 Statutes at Large, 63. These sections prohibited the transportation of "gunpowder, oil of turpentine, camphene, and other burning fluids," except secured in metallic vessels, and except in cases of special license, and affix the penalty of one hundred dollars for the neglect to obtain the license, as well as for receiving the property on board the vessel as freight.

It is in evidence that the plaintiffs did obtain, as early as the 22d February, 1868, from the local inspectors whose duty it was to grant the same, a license to carry on board the *United States* oil of vitriol in the manner prescribed by the law.

But we do not apprehend that a non-compliance with this statute, where no forfeiture is imposed of the vessel or the forbidden merchandise, can *per se* make the vessel unseaworthy.

This question has often been mooted before the courts, and the decision always has been, that the omission of the carrier to perform the duties prescribed by similar statutes does not affect the insurance on the vessel or cargo. *Deshon v. Merchants' Ins. Co.*, 11 Met. 209; *Warren v. Manuf. Ins. Co.*, 13 Pick. 521; *Clark et al. v. Protection Ins. Co.*, 1 Story, 124.

Counsel have agreed that if they have proved the loss was caused by the neglect or unskillfulness of the officers of the *America*, they have the right to be subrogated to any claim against the owners of that boat; but how it is that this proposition can be predicated upon anything we find in the record we can not readily perceive. There is no evidence, in our opinion, which can authorize it, and there is none to raise the implication of any dereliction of duty on the part of the officers of the *America*. It is

mere hypothesis only, and if there was any ground to make the assertion, it could only be permitted to the insurer to demand a subrogation after he has, in good faith, paid the insured for the loss of his vessel: such payment *ex vi termini* being a virtual assignment of all the rights of the assured against third persons growing out of the loss.

The consideration of the questions that have been made in argument has demanded more of our time than is usually allotted to the examination of causes submitted for our decision, not so much for the novelty and difficulty this litigation presents, but rather for the many points urged by the able counsel engaged, the decision of which has required us to review the whole record, and glean from its many pages whatever was pertinent to the issue. Our labors would have been greatly lessened had there been less cumulative testimony, tending, as it always does, to obscure rather than enlighten.

But we have, nevertheless, without dissent, arrived at a conclusion satisfactory to ourselves upon every point made in the cause. We believe the loss of the vessel under the circumstances may have been regarded as absolutely total, though it may have been in reality but constructively total; that what was equivalent to a waiver of abandonment was proved; that the conduct of the defendants made it unnecessary, as it would have been useless, to offer what they had already practically refused to accept, even if made in a formal manner; that the plaintiffs, in raising the wreck and towing it from the place of the accident to Cincinnati, were justified by the facts proved; that there was no repair of the former structure, but the building of a new boat, and no claim of one-third new for old can be set up by the defendants, as by the verdict the entire amount of salvage was allowed to the underwriters in settling the loss.

And we fully coincide with the opinion of our colleague who tried the case, as he has lucidly stated it in his charge,



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and upon which the jury, after determining the facts before them, rendered their verdict.

We are all of the opinion the motion for a new trial must be overruled and judgment entered on the verdict.

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REYNOLDS & AHERN v. J. H. SCHWEINEFUS.

In a suit by a contractor against a property owner to collect an assessment for grading and paving a portion of Front street, where the defense was that the improvement had not been reported and recommended by the board of city improvements, though it appeared that the petition for the improvement was presented January 8, 1861, as follows:

"At a *joint session* of the board of city improvements and committee of public improvements of the city council held this day—in attendance, John Horton, Frederick Stagge, Jeremiah Kiersted, city commissioners, and A. W. Gilbert, city civil engineer; committee of public improvements of the city council, present J. M. Noble, chairman. In the absence of the president, Mr. Kiersted was called to the chair, when the following paper referred to the joint board was taken up and disposed of: The petition of Lewis Glenn and others, property holders on East Front street, in the Seventeenth ward, seeking to have said street graded and paved with bowlder stone. On motion, the prayer of the petitioners was granted, and on motion of Mr. Kiersted, the clerk was instructed to prepare and transmit to the city council an ordinance to grade and pave with bowlder stone Front street, from Washington street to the east line of the city of Cincinnati." Which meeting was immediately succeeded by a meeting of the board of city improvements, at which no action was taken on the matter at all; and though it further appeared that the committee on public improvements of the city council soon after reported the ordinance as coming from the board of city improvements, which was passed, the contract made, work done, and assessment levied:

*Held*, that the statute which declares that no ordinance for the improvement of a street shall be passed by the city council without the report and recommendation of the board of city improvements, requires that the report and recommendation shall be recorded in its proceedings and made to the city council; that such recommendation and report are jurisdictional; that parol evidence is not competent to prove them, and that upon the evidence in this case, no presumption arises that the ordinance was passed at the recommendation and upon the report of the board of city improvements, as required by statute.

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## IN GENERAL TERM ON ERROR.

*S. A. Miller*, for plaintiffs.

*Hoadly, Jackson & Johnson* and *Ware & Disney*, for defendant.

HAGANS, J. This is a suit by the plaintiffs, who are contractors, to recover an assessment against a property owner for grading and paving Front street, on which his property abuts. The objection the defendant makes is, that the ordinance under which the work was done was passed without the previous report and recommendation of the board of city improvements.

The bill of exceptions shows that the evidence on this point consists of a transcript from the records of the board of city improvements, together with the oral testimony of Jeremiah Kiersted, to the introduction of the latter of which the defendant objected, and the objection was overruled and the testimony received. The court found for the plaintiff; motion for a new trial was overruled and exceptions taken, and judgment was rendered for the plaintiff.

The whole case depends upon the admissibility of the evidence of Mr. Kiersted, referred to, as all the other necessary steps are admitted to have been taken.

The transcript from the alleged proceedings of the board of city improvements is as follows:

“OFFICE OF THE BOARD OF CITY IMPROVEMENTS,  
CITY BUILDINGS, Cincinnati, Jan. 8, 1861. } ”

“At a joint session of the board of city improvements and committee of public improvements of the city council, held this day—in attendance, John Horton, Frederick Stagge, Jeremiah Kiersted, city commissioners, and A. W. Gilbert, city civil engineer; committee of public improve-

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ments of the city council, present J. M. Noble, chairman.

"In the absence of the president, Mr. Kiersted was called to the chair, when the following papers referred to the joint board, were taken up and thus disposed of: The petition of Lewis Glenn and other property holders on East Front street, in the Seventeenth ward, asking to have said street graded and paved with bowlder stone. On motion, the prayer of the petitioners was granted, and on motion of Mr. Kiersted, the clerk was instructed to prepare and transmit to the city council an ordinance to grade and pave with bowlder stone Front street from Washington street to the east line of the city of Cincinnati. The remonstrance of Joseph Cox against the paving of L'Hommedieu alley between Plum street and Central avenue was referred to the commissioners.

"The joint session then closed, and the board of city improvements proceeded to regular business. The minutes of the preceding meeting were read and approved."

Mr. Kiersted testifies positively that the board of city improvements ordered an ordinance to grade and pave Front street to be sent to the city council, which afterward passed it; that the ordinance originated in the board of city improvements, and was by it recommended to the city council; that he was particular about it, he being one of the city commissioners and a member of the board, as the work was in his district; that the recommendation by the board was made on a little slip of paper, which was attached to the ordinance and accompanied it; and that if the original ordinance could be found, the slip of paper referred to would be found also, if not detached.

The only question presented by the record in this case is, whether the action of the board of city improvements in the premises can be proved by parol evidence. As will be seen, the record of the action of the board contains no evidence whatever of the alleged recommendation by the board of the passage of the ordinance to grade and pave,

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under which the work was done. Waiving this, however, this case differs wholly from the case of *Fisher v. Graham*, ante 113, for there the record of the board of city improvements showed the due recommendation of the ordinance and direction to the clerk to prepare and transmit the ordinance, which he did, and a due report in writing, though not signed by him. The report and recommendation of the board to the city council to do this work is jurisdictional, because they are conditions precedent to the exercise of the authority to pass a valid ordinance for the improvement, or for the assessment on the property adjoining. This has been frequently held in this court. See *Walker v. Potter*, 18 Ohio St. 85.

The city council could not originate the action taken. That must be done by the board of city improvements. No such work as this "shall be ordered or directed by the city council, except on the report and recommendation of the said board, \* \* \* who shall report from time to time to the city council. \* \* \* The city council shall take such action thereon as may be deemed proper." The board of city improvements is not a corporation of itself, but is a co-ordinate branch of the city government, charged with duties of the greatest moment. By the very constitution of the board, as of most public or corporate bodies, it is necessary, from the highest motives, to keep a record of its proceedings. How else could the vast interests of our citizens, confided by law to the care of this board, be properly protected or its duties be properly discharged? Accordingly, by the ordinances of the city, the plan of keeping a record was adopted by having a clerk of the board, who is charged with keeping a correct record of all the proceedings of the board, and directed to prepare such ordinances as appear in proof in this case, and to report in writing. Especially is it indispensable that such fundamental action of the board as consists of recommendations and reports of all such improvements as the one in this case, should appear on the record of the board to be made

and directed, and this evidence only is competent. It is necessarily exclusive of any other proof, because the facts to be proved by it are jurisdictional.

We should regard it as a dangerous principle to allow oral proof of such important proceedings, or that these records should be supplemented by oral testimony, as it might happen years after the alleged action was had, and would, therefore, be *uncertain* and unsatisfactory. The certificate of the clerk of the board that such action was had is not the only method of proving that fact, for the law does not exclude other methods of proving it. The production of the record itself by the board to the council would be sufficient. But there must be sufficient proof of such action, and a sufficient report to the council, which can only be by showing from the record of the board that the appropriate action was had. Nothing in these respects can be presumed favorably. Indeed, the very absence of any record of action by the board in the premises, it appearing that they had the matter under consideration, raises a presumption that it either was deemed best to take no action at all, or else that the sentiment was unfavorable to the project.

The testimony of Mr. Kiersted ought to have been rejected by the judge at Special Term.

A majority of the court think that we have gone quite to the verge on this question in the case of *Fisher v. Graham*, ante 113.

Judgment reversed and cause remanded.

TAFT, J., dissented.

This is a suit by a contractor to recover against a property owner the amount of an assessment on his property for grading and paving Front street, on which his lot fronts. The work has been done, and the defendant denies his obligation to pay for it, because he denies the validity of the ordinance under which it was done.

The claim is that the city council passed the ordinance

without the recommendation by the board of public improvements.

The evidence as to the fact consists of a transcript from the proceedings of the board of public improvements, and the testimony of Mr. Kiersted, the commissioner of the district in which the work was done, both of which pieces of evidence were objected to by defendant's counsel.

The transcript of proceedings was as follows, viz:

“OFFICE OF BOARD OF CITY IMPROVEMENTS,  
CITY BUILDINGS, Cincinnati, Jan. 8, 1861. } ”

“At a joint session of the board of city improvements and committee of public improvements of the city council, held this day, in attendance John Horton, Frederick Stagge, Jeremiah Kiersted, city commissioners, and A. W. Gilbert, city civil engineer; committee of public improvements of the city council, present J. M. Noble, chairman. In the absence of the president, Mr. Kiersted was called to the chair, when the following papers, referred to the joint board, were taken up and thus disposed of:

“The petition of Lewis Slevin and other property holders on East Front street, in the Seventeenth ward, seeking to have said street graded and paved with bowlder stone. On motion, the prayer of the petitioners was granted; and on motion of Mr. Kiersted, the clerk was instructed to prepare and transmit to the city council an ordinance to grade and pave with bowlder stone Front street, from Washington street to the east line of the city of Cincinnati.

“The remonstrance from Jos. Cox, remonstrating against the paving of L’Hommedieu alley, between Plum street and Central avenue, was referred to the commissioners.

“The joint session then closed, and the board of city improvements proceeded to regular business. The minutes of the preceding meeting were read and approved.”

Mr. Kiersted testified positively and explicitly, that the board of city improvements did recommend the ordinances

to grade and pave the street, in the usual way, by instructing the clerk to prepare the ordinance and hand it to the council, with a recommendation attached to it, on a separate slip of paper, authenticated by the clerk.

The first question to be determined is, whether the requisition as to this report and recommendation is jurisdictional, so that an ordinance passed without it would be void; or directory, prescribing this as a rule of proceeding, but not essential to the validity of the ordinance.

In favor of the latter view, is the fact that the power of improving streets is inherent in the city council, as the legislative department of the city government. The board of city improvements does not order any improvements, or appropriate any money to make them. All this falls within the province of the city council. Nor is the mere form of expression in the statute as affirmative or negative, decisive of the question whether a requirement is directory, or jurisdictional. The subject matter of the act is to be considered, and all the circumstances connected with the requisition.

By the charter of New York, under the act of 1830, section 7, it was provided, in imperative language, "that the ayes and noes should be called and published whenever a vote of the common council should be taken on any proposed improvement involving a tax or assessment upon citizens." 7 Hill, 29.

But this provision was "construed as merely directory; the essential requisite being the determination of the corporation, and not the form or manner of expressing that determination." *Striker v. Kelly*, 7 Hill, 24.

In *The People v. Carpenter*, 24 N. Y. 92, it was laid down that the validity of a legislative act of a municipal corporation can not be impeached by want of evidence that the preliminary notices, required to be given prior to the application for the law, had been given. It was not for those acting under the law to make this proof, even if it were necessary. But it is not essential to the validity of

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the act, that proof of the publication and posting of the notices shall be furnished. "*Omnia præsumentur rite, et solemniter esse acta donec probatur in contrarium.*"

The question of making the improvement was a legislative question, and the presumption is, that all the preliminary steps were rightly taken. Such is the evident purport of the decision in *The People v. Carpenter*, and this is in accordance with reason and the current of precedents.

In the case of *Fry v. Booth*, 19 Ohio St. 25, decided by our Supreme Court at the present term, it was held that section 5 of the election act of May 3, 1852, providing "that at all elections to be holden under this act, the polls shall be opened between the hours of six and ten in the morning, and closed at six in the afternoon of the same day," was *directory*, and that a departure from a strict observance of its provisions does not necessarily invalidate the election, where it appears that no fraud had been practiced and no substantial right violated.

In the case of *Downing v. Rugar*, 21 Wend. 182, it was held that where the statute conveyed a joint authority upon the two overseers of the poor, it was necessary they should confer and act together; but that there was a strong presumption that they had so acted, and that the court would so regard it unless the evidence expressly shows the contrary. The court say, p. 184: "The presumptions of which I have spoken, especially those arising from official duty, are very strong, and that the duty was not performed must be shown by calling those whose relation to the transaction can put a direct negative upon it, unless their absence be accounted for."

In that case one of the two overseers had acted in an important matter which required the concurrent action of both. The court say that "if the absent overseer had not given his consent and authority to proceed, he alone could say so; and we think it due to the defendant and the general safety of this kind of officers to presume they



proceeded regularly, till the best sources of information are exhausted."

In the case of *Lessee of Ward v. Barrows*, 2 Ohio St. 241, the question turned upon the fact whether the delinquent list was properly sworn to before the auditor by the collector. This was by statute, made necessary to the validity of the sale. The auditor proceeded, in his settlement with the collector, as if the list of delinquencies was correct, and gave credit according to it, which it would have been a breach of duty on his part to have done, unless the list had been properly sworn to, as required by the statute. The court say: "Under such circumstances, unless the statute makes written evidence indispensable, the officer will be presumed to have done his duty until the contrary appears." 1 Greenl. on Ev. 51; Matthews on Presumptions, 36. The law will presume all to have been rightly done unless the circumstances of the case overturn this presumption; and, consequently, as stated by the Supreme Court of the United States in *Bank United States v. Dandridge*, 12 Wheaton, 70: "Acts done, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter."

"Facts presumed are as effectually established as facts proved, where no presumption is allowed; and hence, in accordance with this long established rule of evidence, the court in *Lessee of Winkler v. Starling*, 7 Ohio, 539, were entirely justified in saying that the act of the auditor, in allowing the credit and making the certificate, which could only lawfully be done after the delinquent list had been verified by the collector, was presumptive proof that the oath had been administered."

The court cite, as illustrating the various applications of the doctrine, *Williams v. East India Co.*, 3 E. 192; *Kelly v. Connell*, 3 Dana, 532; *Wheelock v. Hull*, 3 N. H. 310; *Brown v. Connelly*, 5 Blackf. 390; *Hart v. Root*, 19 Ohio, 345; *Jackson v. Shaeffer*, 11 Ohio, 513; and 9 Conn. 110.

In the case of the *Lessee of Coombs and Ewing v. Lane*,

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4 Ohio St. 112, the same court, Thurman, C. J., giving the opinion, adopt this principle as applied in *Ward's Lessee v. Barrows*, 2 Ohio St. 246, and in *Winder's Lessee v. Starling*, 7 Ohio, 539, to the entry of school lands, presuming that lands which the register of the land office had entered on his "tract book" as "school lands" had been selected, which the statute required before they could lawfully become school lands.

In the present case there is no evidence that the necessary recommendation by the board of city improvements did not precede the action of the city council in passing the ordinance to improve. Leaving out of our view, for the present, the testimony of Mr. Kiersted, who testifies positively that such recommendation was made, does it appear that the city council have been guilty of a breach of their legislative duty, by determining to make the improvement without the recommendation of the board of improvements. We have in evidence, as a record of the proceedings of the board, a paper which purports to give the minutes of a meeting of the board jointly with Mr. Noble, chairman of the committee on public improvements of the city council. That record shows that there was a clearly expressed purpose of the board to prepare an ordinance and recommend its passage.

It is claimed that these proceedings were invalidated by the presence of Mr. Noble, and by calling the meeting a joint meeting. But if the board of city improvements acted on the subject and recommended the ordinance, I think it is not material how many other persons may have done the same thing. The argument for the defendant is, that it would be possible for the recommendation to be carried in such a joint meeting, where there was not actually a majority of the board in its favor. But it is not our duty to presume that these officers of the city government violated their duty, when it is altogether more probable that they performed it. There is no reason to infer from the record, that any member of the joint

meeting did not favor the recommendation of the ordinance. If the joint meeting meant that the committee were one party, and the board were the other party to the joint meeting, the measure could not have passed but by the concurrence of both parties. But I think that the more reasonable theory of that meeting is that the presence of Mr. Noble was merely for consultation and information, and did not prevent the board from acting in good faith upon the subject of their deliberation, and that it did act, ordering their clerk to prepare the ordinance and present it to the city council, with a recommendation that it pass in the usual way.

Besides, there is no provision of the statute requiring that the report and recommendation should be of any particular form, or that it should be in writing even.

The presumption is strong that this preliminary step was complied with. The record of the proceedings of the council shows that that body acted upon it as coming from the board; and this record of the proceedings of the board just preceding the meeting of the city council really shows the same thing, and by no means shows anything to rebut the strong presumption that the city council did have what they assumed in their proceedings to have had, the report and recommendation of the board to proceed upon.

Here is no ground whatever to suppose that this work has not been done with the full concurrence of the board of city improvements. It had the consideration of that board, as appears from their minutes, and there is no indication of any dissent on the part of any member. The city council proceeded on that hypothesis; the work was contracted for, and all done and well done, according to the testimony, and the defendants have had the benefit of it. It is now proposed to have them excused from paying their share of the cost, and the burden of their local improvement thrown upon the city generally,

by the suggestion that the city council did not have formal evidence of the recommendation by the board of city improvements before proceeding to contract for the work, presuming that the city council, as well as the board of city improvements, violated their duty instead of performing it. This claim asks us to deal with the official representatives of the city in a harsh and suspicious manner, prejudicial to the public interest and contrary to the presumption in favor of official acts uniformly recognized in all courts of justice.

But I think that the evidence of Kiersted, the commissioner, is also competent evidence, and if so, it does prove positively the fact of a preparation and recommendation of the ordinance. The presumption arising from the circumstances is strong without that testimony, and as I think sufficient. But this testimony is positive.

Objection is taken to this testimony on the ground that the board have a clerk and a record, and so can only speak by its record.

The statute creating the board requires no clerk and no written record, and requires no written report or recommendation. The clerk and minutes of proceedings have been created by the city council. Nor has the city council curtailed the power of the board in its mode of expression. It has given it a clerk, and given authenticity to the clerk's certificate; but it has not, if it could have done so, declared that that was the only mode in which the board could communicate. So that if the board had by vote authorized the civil engineer, who is also a member of the board, to communicate to the city council the report and recommendation of an improvement, the city council could act upon it though it were merely verbal. The object of the statute was to give the city council the benefit of the preliminary advice of the board before entering upon a public work. It was not a matter of form at all, but of substance.

The communication between these two bodies is not

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between two corporations, but between two co-operating branches of the same corporation. There is no legal reason why it could not be verbal, and if so it can be proved verbally. We think, therefore, that the evidence of Kiersted was competent; and his official position at the time renders his testimony of great weight. No man in the city government would be so likely to know precisely what was done on this subject as he. It fell directly within the line of his duty.

In *United States v. Fillebrown*, 7 P. 28, which arose upon the proof of the proceedings of the board of commissioners of the hospital fund, at Washington, connected with the navy department, the court say, on p. 47: "There is no general principle of law known to the court, and no authority has been shown, establishing the doctrine that all the proceedings of such boards must be in writing, or that they shall be deemed void, unless the statute under which they act shall require their proceedings to be reduced to writing. It is certainly fit and proper that every important transaction of the board should be committed to writing; but the law imposes no such indispensable duty. The act of 1811, 4 Laws U. S. 311, constituting the fund for navy hospitals, only makes the secretaries of the navy, treasury, and war departments a board of commissioners by the name and style of commissioners of navy hospitals, and gives some general directions in what way the fund is to be employed; but the mode and manner of transacting their business is not in any respect prescribed."

It is very much the same in the present case, and it would seem that the mode of proceeding was much the same in that board as in this, with its clerk and minutes.

The court proceeded to say: "It is not true, even with respect to corporations, that all their acts must be established by positive record evidence."

In the case of *United States v. Dandridge*, 12 Wheat. 69, the court says: "We do not admit, as a general proposition,

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that the acts of a corporation are invalid merely from an omission to have them reduced to writing, unless the statute creating it makes such writing indispensable as evidence or to give them obligatory force." The court held the parol testimony of Mr. Southard, a member of the board, in that case competent to establish the acts of the board.

The statute creating this board of city improvements has no provision rendering it necessary that its acts should be reduced to writing or recorded.

This subject has been considered very carefully in the courts of Wisconsin, as may be seen by reference to R. S. Wis., ch. 19, secs. 2, 53, 54, 56-59; 16 Wis. 519. The same doctrine, however, is illustrated in the courts of nearly all the States. 34 Vt. 256-262; 20 Vt. 440; 52 Me. 535; 48 Me. 440; 4 Ohio St. 112; 5 Ohio, 136; 3 Ohio, 94; 16 E. L. & E. 55-62.

Considering the whole case, I find no adequate excuse or reason for relieving the property holders on Front street from bearing their respective shares of the burden of making this improvement which they are enjoying.

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THOMAS LLOYD, Plaintiff, v. WM. P. HULBERT, Defendant.

Where an owner of land dedicates a strip of ground twenty-five feet wide adjoining the land of his neighbor, on condition that his neighbor shall dedicate a like strip from his land, so as to make a street of fifty feet in width, and immediately opens his part of the street to public use, and permits it to be used by the public as a street for eighteen years:

*Held*, that the condition was waived, and that the dedication had become absolute, although the neighbor had refused to dedicate his part of the street, and that the city council had the right to improve the street as dedicated twenty-five feet in width, and assess the cost of the improvement upon the property abutting thereon.

IN GENERAL TERM ON ERROR.—The defendant is the owner of property assessed for the improvement of Maple

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street, on which his property fronts. The defense is that Maple street is not legally a street over which the city has any control; besides, that the street has never been opened for its full width; and avers that in 1853 J. W. Lawson laid out a subdivision of lots on the south side of said Maple street, and that on the plat of said subdivision Maple street is laid out the width of fifty feet, and only twenty-five feet of said street was dedicated by said Lawson, and that on condition that the street should be fifty feet in width. The defendant further avers that no more ground has been dedicated, and that the street has been opened but twenty-five feet wide, and he therefore denies the power of the city to improve the street and pay for it by assessment.

It appears that Mr. Lawson undertook to dedicate twenty-five feet of ground as part of a fifty-foot street, which was to be one-half on the ground of Hulbert, the defendant, and one-half on the land of Lawson. Lawson opened that part of the street which was on his land, but the defendant has not opened that part which is on his ground, and claims that such a street is an injury to his property.

From the evidence, it further appears that, although in its origin Mr. Lawson dedicated his twenty-five feet as part of a fifty-foot street, he, nevertheless, opened the twenty-five feet, and treated it as a street, and it has been so used since 1853 without objection on his part, and lands have been sold and deeds made by him bounding and abutting upon it as a street.

*Bevan & Dolle*, for plaintiff.

*Henry M. Cist*, for defendant.

Taft, J. We think that dedicating the twenty-five feet as a street eighteen years ago, and opening it, is evidence of an absolute dedication; and if there were any

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implied condition by describing it as part of a fifty-foot street, such condition was long since waived by actually opening the street without requiring the dedication of the other twenty-five feet.

This dedication was so long ago as to be complete, without any formal acceptance by ordinance. It had, as we think, been accepted before the enactment of the law, which required the acceptance of a dedication by ordinance. The street, therefore, was a public street within the control of the city, and, as such, a proper subject of improvement by grading and paving. This is according to a decision of this court made several years since in the case of *Wilby v. Bonte*. Indeed, it was the duty of the city to improve it. The assessment appears to have been legal, and we see no reason to disturb the finding or judgment of the court at Special Term.

Judgment affirmed.

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L. F. WEHRMAN & Co., Plaintiffs, v. CHAS. C. REAKIRT  
ET AL., Defendants.

The liability of individual stockholders, under the constitution and statute of Ohio, is collateral to the principal obligation of the corporation, and is to be resorted to by the creditors only in case of the insolvency of the corporation, or where payment can not be enforced against it by the ordinary process of execution.

Each stockholder of an insolvent corporation, in addition to the loss of his stock, is liable in a sum equal to the amount of his stock to all the creditors of the corporation. But between the stockholders themselves, there is an equitable right to have a contribution by each, in proportion to his stock, and this equitable right will be enforced by the court in the creditor's suit so far as it can be done without prejudice to the paramount right of the creditors, who are entitled to be paid in full, and to hold each solvent stockholder to the full extent of his statutory liability, irrespective of those who are insolvent or beyond the jurisdiction of the court.



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In determining whether a stockholder is individually liable for debts of the corporation after a transfer of his stock, it is not essential to the validity of such transfer that it should be entered upon the register, or that a new certificate of stock should be issued; but it is necessary that the transfer be made in good faith and with consideration, and not merely to escape the liabilities of the corporation already incurred; nor can any transfer relieve the stockholder from his individual liability for debts of the corporation, incurred while he was a stockholder.

The liability of a stockholder, from the time of the commencement of a suit, for an amount of indebtedness exceeding the principal of the stock owned by solvent stockholders within the jurisdiction of the court, is fixed for the specific sum equal to the amount of each of such stockholders' stock, and the debt carries interest from the commencement of such suit, although the amount of the creditor's recovery may thereby exceed the stockholder's original liability.

RESERVED FROM SPECIAL TERM.—This is a suit by a judgment creditor of the Cincinnati Home Insurance Company, in behalf of himself and all other creditors of the company, to enforce the statutory individual liability of the stockholders to the creditors. The company is shown to be insolvent, and to have made an assignment for the benefit of its creditors. The case has been referred to a referee, who, in pursuance of the order of reference, has reported that the liabilities of the corporation are \$141,879.60, of which \$38,879.68 is due to policy holders for unearned premiums; that the assets of the corporation in the control of the assignee, nominally amount to \$13,958.64, the actual value of which is not ascertained; that the amount of stock issued and held is about \$140,000, so that the additional liability of the stockholders is also \$140,000; that a large portion, not less than fifty per cent. on the whole amount of stock, is held by insolvent parties, so that the entire amount of the statutory additional individual liability will be required to meet the indebtedness of the company; and he reports that the creditors are entitled to a judgment or decree against the stockholders served, for the full amount of their statutory liability. All the stockholders within the jurisdiction of

the court have been served and are parties; but a part of the stockholders are beyond the jurisdiction of the court and have not been served. A motion is made to set aside this finding, on the ground that it does not appear that the liabilities of the company are sufficient to absorb all the assets in the control of the assignee, \$13,900, and the entire \$140,000 of additional statutory liability, and that it should first be ascertained, with accuracy, how much is the value of the assets, and how great the amount of the liabilities, by waiting till the claimants shall file and prove their claims after notice published, and that for the balance or excess of the liabilities so ascertained, an assessment be made on the entire amount of stock, so that no stockholder shall be required to pay any more of the indebtedness of the corporation, than he would pay if all the stockholders were solvent and parties to the suit.

The referee has gone upon the idea, that the company having proved insolvent, the stockholders were each liable individually to all the creditors in sums equal to the stock held by them respectively.

*I. J. Miller*, for plaintiffs.

*Perry & Jenney, Stallo & Kittredge, D. Thew Wright, Henry Snow, T. B. Paxton, and Jacob Burnet*, for defendants.

Taft, J. The most important question to be decided in the case is, whether the creditors are entitled to enforce their claims against the solvent stockholders to the extent of the amount of their stock, if such enforcement is necessary in order to pay the creditors in full, although they should be unable to collect anything from other stockholders who are insolvent or beyond the jurisdiction of the court. It is claimed for the defendants that one stockholder is not a surety for another, and that each is liable only for his proportional share of the debt, although his

statutory liability (to an amount equal to his stock) should not be exhausted, and the creditor should not be fully paid.

This is a question of great importance under our constitution and laws.

The constitutional provision on the subject is contained in section 3 of article 13, viz: "Dues from corporations shall be *secured* by such individual liability of the stockholders and other means as may be prescribed by law; but in all cases each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock."

The Cincinnati Home Insurance Company was organized under the act to provide for the creation and regulation of incorporated companies in the State of Ohio, passed May 1, 1852, as amended April 17, 1854, section 78 of which provides, that "all stockholders of any railroad, turnpike, or plank road, magnetic telegraph, or bridge company, or any joint stock company organized under the provisions of this act, shall be deemed and held liable to an amount equal to their stock subscribed, in addition to said stock, *for the purpose of securing the creditors of such company.*" 1 S. & C. 310; 4 Curwin's Stat. 2582.

The Supreme Court, in *Bright v. McCormick*, 17 Ohio St. 95, held that this liability of individual stockholders is collateral to the principal obligation of the corporation "and is to be resorted to by the creditors only in case of the insolvency of the corporation, or where payment can not be enforced against it by the ordinary process."

This liability is several in its nature, because the constitution provides that "*each stockholder* shall be liable to a further sum at least equal in amount to his stock."

We are of opinion that the insolvency, on the happening of which the individual liability of the stockholders can be enforced, is not necessarily the absolute exhaustion of all the assets of the corporation. It may be evidenced by

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a failure to make the money on the ordinary process of execution against the company.

The majority of the court are also of opinion, that each stockholder, to the extent of his stock, is legally liable for the entire indebtedness. But between the stockholders, there is an equity to have a contribution in proportion to the amount of stock owned by each. This equity will be respected by the court, so as not to put upon any stockholder the trouble, expense, and risk of bringing a new suit to compel other stockholders to refund moneys which they ought to contribute in the first instance, so far as it can be done, without prejudice to the rights of the creditors. But this equity between the stockholders is not paramount to the right of the creditors to be paid, and if it is not possible to reach all the solvent stockholders, or subject them to the jurisdiction of the court without unreasonable delay, those who are found within the jurisdiction of the court may be required to pay the indebtedness of the company to the extent of their individual liability, without prejudice to their right to subject their co-stockholders to a contribution by other subsequent proceedings.

In the present case, the majority of the court is satisfied that the evidence sustains the finding of the referee on this point, and that the stockholders should be required to pay the entire amount of their additional liability under the constitution and statute already referred to.

The evidence shows that the aggregate liability of the solvent stockholders will not be sufficient to pay the indebtedness, and it would be unjust to the creditors to make longer delay in rendering judgment against those who are before the court. The absence from the jurisdiction of the court, or the insolvency of one stockholder, is no defense for another, nor any reason for delay on the part of one who is solvent, to pay the indebtedness of the corporation to the extent of his liability. This, we think, is consistent with the ruling of the Supreme Court in the cases of *Wright v. McCormick* and *Umsted v. Buskirk*, re-

ported in 17 Ohio St. 86 and 113; and necessary, by any reasonable construction of the constitution and statute.

If there were others within the jurisdiction of the court not served with process or not parties, they would have to be brought in and made to contribute. But it is conceded that such is not the case.

It is insisted that the Supreme Judicial Court of Massachusetts has decided differently, and that the cases of *Crease v. Babcock*, 10 Met. 525, and *Grew v. Andrews, Breed & Co.*, in 10 Met. 569, are authorities against the position we have announced. The statute of Massachusetts, under which those decisions were made, provided "that the holders of stock in any bank at the time when its charter should expire should be liable in their individual capacities for the payment and redemption of all bills which may have been issued by said bank, and which should remain unpaid, in proportion to the stock they may respectively hold at the dissolution of the charter." The court held under that statute, that each stockholder was liable only for his own proportion of the unpaid bank notes, and that every other stockholder was liable for his own share or proportion, and that one was not liable for the share or proportion of any other. This construction turned upon the language of the act.

There was no constitutional provision on the subject. Our constitution has no such limitation on the individual liability of stockholders, nor has the statute. By our constitution, "each stockholder shall be liable over and above the stock by him or her owned" "to a further sum at least equal in amount to such stock;" and by the statute "all stockholders" "shall be deemed and held liable to an amount equal to their stock subscribed, in addition to said stock, for the purpose of securing the creditors of such company."

The liability is several, and collateral to the principal indebtedness, but it is legally without any other limit than

the amount of the stock owned by the stockholder on the one hand, and the entire indebtedness of the corporation on the other.

The liability is necessarily several, because it is for different sums depending upon the respective amounts of stock owned. No joint judgment could be rendered; but each is liable for all, to the extent of his stock. *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 479, is an authority, Thompson, J., giving the opinion.

In *Erickson v. Nesmith*, 46 N. H. 371, it was held, under a statute providing for the filing a petition in equity to subject stockholders, in order to make all contribute, that the plaintiff might have a decree against the stockholders individually who had been served, or who had become voluntarily parties and who were found solvent, for the whole amount of their debt and costs, to be apportioned among them *pro rata*, each paying such proportion of the whole debt, as his stock bears to the whole amount of stock owned by the solvent stockholders who were parties to the suit. This is the rule we have indicated as the true one under our statute, and applicable to the present case. *Patterson v. Wyomissing Co.*, 40 Pa. 117; *Paine v. Stewart*, 83 Conn. 516; *Dauchy v. Brown*, 24 Vt. 197; *Coleman v. White*, 14 Wis. 700.

We think that the facts before the referee show that, upon the principle above indicated, the plaintiffs are entitled to a decree against the defendant stockholders respectively, for the full amounts of their individual liability.

It is claimed by Overdick, one of the defendants, who is charged as owner of stock to the amount of \$5,000, that he had transferred \$4,000 of his stock before the insolvency of the company in good faith, and was not therefore chargeable as owner of the stock so transferred. The transfer was not entered on the company's books of transfer. In a very few days after the transfer the insolvency of the company was developed, and an assignment was made under an assignment law of the State.

We think that the fact that the transfer was not entered on the books of the company and accepted, is not decisive against the validity of the transfer. But there are two objections to this transfer, as a defense to this action. First, that the sale and transfer were made just before the assignment as an insolvent, and for a nominal consideration. The presumption is strong under the circumstances that the transfer was made merely for the purpose of getting rid of the liability. But the decisive objection to this defense is, that the liabilities of the company were incurred in the time of the ownership by the defendant Overdick. If there were any liabilities contracted after this transfer, they were of very small amount. The finding of the referee on this point appears to be sustained by the evidence that Overdick is liable as an owner of \$5,000 of the capital stock in the company.

J. C. Tucker, another defendant, claims to be relieved from his liability as owner, because he transferred his stock on the 7th March, 1864. This transfer seems to have been *bona fide*, at 33 per cent., to Eber Jones. In this case, also, the new certificate had not been issued to Jones.

This transfer was made about six months earlier than that in the Overdick case. But the liabilities had been incurred which have now to be paid, or a great majority of them, and we conclude that we have no sufficient ground to set aside the finding of the referee on this point.

Barber, Choate & Naber are also charged by the referee as stockholders in the amount of \$3,000. The evidence in the case of these defendants satisfies the Court that they were never actual stockholders, although their names did appear upon the books of the corporation for a short time. The contract with Bennett, under which they were to own the stock, never went into effect, and was rescinded. We conclude that the liability on account of that stock rested upon Bennett, and not upon Barber, Choate & Naber, and the finding of the referee will be corrected in that respect.

An objection is taken to the proof of claims as allowed

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and stated by the referee, on the ground that he has taken the proof of allowance by the assignee, as evidence. There seems to be no serious question, except as to the \$38,800 for unearned premiums due to the policy holders, who are entitled to have their policies canceled, and the unearned part of their premiums returned. The proceeding of the assignee, is by publishing a notice to claimants to present their claims. The claims for losses, appear to have been presented in response to such a notice. But it is presumed and argued that such was not the case with the unearned premiums. It is claimed that the sums were so small, being from a few cents to a hundred dollars, that it is to be presumed that a large portion of these policy holders will never present their claims for return of premium, and that, therefore, it is not necessary to provide for their payment. We think that the proper course to have been pursued was to notify by publication the creditors and claimants to present their claims, and we might regard the omission of such a notice as an adequate reason for postponement of proceedings against stockholders as to their individual liability, if it did not appear that an amount of valid claims was already presented, sufficient to absorb the liability of all the solvent stockholders.

It appears from the referee's report that a very large part of the stockholders are not solvent, a majority of whom have gone also beyond the jurisdiction of the court.

There is, for instance, D. M. Bennett holding stock to  
the amount of.....\$30,000  
On which \$20,100 are unpaid..... 20,100

	\$50,100
There is a Mrs. Standart holding.....	\$10,000
On which are unpaid.....	6,700
And C. M. Ransom holding.....	\$10,100
On which is unpaid.....	6,767
	—————\$16,867



And many others holding smaller amounts, all gone beyond our reach and reported insolvent. There are many excellent names among the stockholders, who will undoubtedly pay promptly whatever shall be found to be their share of the load. They have been imposed upon by these delusive holders of stock not paid for, whose individual liability is a cheat and a sham. In amount, these non-paying nominal men are in a majority, or nearly so. The consequence is, that the amount of stock held by men whose individual liability is solid or reliable is less than the amount of the debts in whatever way we estimate them.

The consequence is unavoidable, that a decree should go against the stockholders for the full amount of their additional liability. This result is in some respects unsatisfactory, because it requires the solvent stockholders to pay indebtedness, which ought to be paid by those who are not solvent. But we can not deny to the creditors their rights under the constitution and the law.

A question has been made as to the time from which the additional liability of the stockholders shall bear interest, the plaintiffs claiming that it should commence with the date of the original liability of the company, and the defendants claiming that it should be regarded as a penalty of a bond, and carry no interest until judgment rendered against the stockholder for his additional liability.

In Sedgwick on Damages, 425, the author says, that "the American rule from all the cases seems to be that against a surety in *debt on bond*, nothing shall be recovered beyond the penalty," citing *Clark v. Bush*, 3 Cowen, 151; *Rayner v. Clarke*, S. C. 581.

In the following cases, however, viz: *Fraser v. Little*, 18 Mich. 195, and *Brainard v. Jones*, 18 N. Y. 35, it was held that after the default of a surety in a bond for the payment of money, the debt carries interest against the surety and the judgment may in that manner amount to more than the penalty in the bond.

And on that principle, it was held, in *Burr v. Wilcox*, 22 N. Y. 551, that "where the stockholders of a corporation are by statute severally individually liable to the creditors of the company, to an amount equal to the amount of stock held by them respectively, this liability, from the time of the commencement of a suit for a debt exceeding the principal of the defendant's stock, brought to enforce it, is fixed for the specific sum equal to the amount of the stock, and the debt carries interest, although the amount of the creditor's recovery thereby exceeds the stockholders' original liability." In the present case we conclude that the same rule is applicable, and that the individual liability should bear interest only from the commencement of this suit.

A question has been made upon two items allowed by the judge at Special Term against the stockholders, viz: for the fee of the plaintiff's counsel and for the cost of the reference by which the amount of indebtedness and of stock was ascertained, in order to determine the amount which each defendant stockholder should contribute. We have concluded that the counsel fee, and the fee of the referee, were expenses incident to the ascertainment of the extent of relief to be claimed or granted for the benefit of plaintiffs, as well as of the defendants, and should be charged to the fund, and the order at Special Term may be set aside as to these two items, and corrected by charging the same items to the fund in the hands of the receiver.

HAGANS, J., dissented. The main question upon which we differ, arises upon the motion for judgment for the "additional" liability found to be due from the respective stockholders for the par value of their stock.

Article 13, section 3, of the constitution, is as follows: "Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law, but in ~~a~~ cases each stockholder shall be liable over and above the stock by him or her owned, and any amount unpaid thereon, to a farther sum at least equal in amount to such stock."

This clause of the constitution was the result of a compromise in the constitutional convention. The discussion upon it was lengthy and able. The whigs were for imposing no liability whatever on stockholders. The democrats were for making stockholders liable as partners, without reference to amounts of stock held: so that if one held but a small amount of stock, his whole private property should be answerable to the creditors of the corporation, if necessary. The whigs desired no change in the law as it had been; the democrats, representing those who smarted under losses by trusting corporations, desired every corporation to be held as a partnership.

Section 78 of the act of 1852 (1 S. & C. 310), already referred to, under which this action is brought, is as follows: "All stockholders \* \* \* of any joint stock company organized under the provisions of this act, shall be deemed and held liable to an amount equal to their stock subscribed in addition to said stock, for the purpose of securing the creditors of such company." The balance of this section relates to the directors of religious and other societies, and makes them liable individually. Our Supreme Court, *Wright, etc. v. McCormick, etc.*, 17 Ohio St. 95, has set at rest the construction of the enactment. "The liability thus imposed on stockholders is not a primary resource or fund for the payment of debts of any corporation. It is collateral and conditional to the principal obligation which rests on the corporation, and is to be resorted to by

the creditors only in case of the insolvency of the corporation, or when payment can not be enforced against it by the ordinary process. It is a security provided by law for the exclusive benefit of the creditors, over which the corporate authorities have no control. The liability on the part of the stockholders is *several* in its nature, but the right arising out of this liability would seem to be intended for the common and equal benefit of all the creditors." It is apparent from the reading of the section quoted, as well as from the opinion of the Supreme Court, that the stockholders are not jointly, nor jointly and severally liable. The liability is created by statute, not by contract, and is incidental to the relation of stockholder. In respect to the stock held by each owner, it is separate property, and the stockholder is the sole owner and is separately liable thereon. There is nothing in the constitution or in the act, which gives stockholders of corporations the character or imposes on them the liabilities of partners, as in several of the States, and perhaps in Ohio under special statutes. See *Owen v. Purdy*, 12 Ohio St. 73; *Commercial Bank v. Factory*, 6 R. I. 154; *Morey v. Clark*, 17 Mass. 330; *Garrison v. Howe*, 17 N. Y. 458; *Neon v. Okley*, 2 Hill, 265; *Chesley v. Pericote*, 32 N. H. 388.

When persons are jointly, or jointly and severally liable, it is because, as between them and the creditors, each is liable, by contract *in solido*, for the whole amount, and there is, therefore, no injustice in requiring any one of them to pay the whole amount, leaving him to obtain redress among his co-debtors as he can. If necessary, one may be compelled to pay the whole debt without reference to the solvency of the rest of his co-debtors. He is a guarantor, so to speak, to the creditors of the solvency of the co-debtors. It will be observed, however, that the statute does not make the stockholders liable to the corporation, nor for each other, but for the purpose of securing the creditors of the corporation.

Many of the stockholders are not within the jurisdiction of the court, and can not be reached by either process or

publication, and can not therefore be bound by its judgment. And some of those who are within the jurisdiction of the court and served with process, and upon whom a judgment will be binding, are nevertheless insolvent, and some, as appears by the receiver's report, have been discharged by proceedings in bankruptcy. It follows, from what has been stated, that those who are solvent do not stand in the relation of joint or joint and several debtors to the creditors, nor as sureties or guarantors for the insolvent stockholders. The stockholders are not liable to a common burden, but only each is severally liable for the amount charged upon him by the statute in respect of his separate stock. The creditors having but a limited claim upon those who are liable, can not throw upon them the loss arising either from the insolvency of some stockholders or from the absence of others from the jurisdiction of the court, all of whom are made equally liable by the statute. To hold otherwise would be to say that the debts of an insolvent corporation are practically a burden on the solvent stockholders only; and they who pay the debt relieve the insolvent stockholders, *pro tanto*, under our statute, which makes all the stockholders equally liable to the creditors, and in no sense makes them jointly or jointly and severally liable to the creditors, or for the solvency of each other. In *Umstead v. Buskirk*, 17 Ohio St. 113, it is broadly stated that the "additional liability" can not be enforced against part of the stockholders at the election of the creditors, without the right on their part to call on their co-stockholders for a general account and contribution in proportion to their shares of stock. "The right of contribution," says the court, "grows out of the organic relation existing among the stockholders. As between them and the creditors, each stockholder is *severally* liable to all the creditors, and as between themselves, *each stockholder is bound to pay in proportion to his stock.*" They have the right to insist upon contribution on that principle, and, growing out of this right, is the duty of the stockholders to contribute. No one or more of the stockholders, therefore, can shift this duty upon the shoulders of any

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other one or more of them, and the creditors can not exact the performance of this duty from one or more only, to the exclusion of any one or more, for any reason whatever. These views of that clause of section 78 of the statute (1 S. & C. 810), already quoted, are strengthened by the clause of the same section which immediately succeeds, relating to the liability of the directors of religious and other societies, in which it is declared they "shall be deemed and held individually liable for all debts contracted by them for their respective societies or associations." Here the legislature has substantially declared that directors of the societies shall be liable as partners, just as if they were not incorporated. But we are not to legislate into the first clause relating to *stockholders* the individual liability imposed upon *directors* in the succeeding clause, but rather to construe the first clause as the legislature plainly intended it to be. We are not for any reason to enlarge the statutory liability. No case, it is believed, can be found in any of the States where similar legislation has been had, enforcing the individual liability of stockholders, on the ground that they are jointly liable or jointly and severally liable, in which that legislation does not, by some expression in the statute, plainly authorize such a construction. In our statute there is no such expression.

It is said by my brethren that the liability is necessarily several, because it is for different amounts, depending upon the respective amounts of stock. No joint judgment can be rendered, but each is liable for all to the extent of his stock. The judgment must be for different amounts. The proposition, when carefully considered, states, in fact, that the liability is joint and the judgment must be several, because the liability is several, which is hopeless confusion, as it seems to me.

Holding these views as I do, this cause presents only the ordinary contingency as to many of these stockholders which all creditors assume, viz: that their debtors may be either unable to pay when called upon, or be beyond the reach of process, though the demand be perfectly valid and capable of suit. *Crease, etc. v. Babcock, etc.*, 10 Met. 525.

**EMMA RILEY, Plaintiff, v. THOMAS COGHILL, Defendant.**

It is not a valid objection to the report of a referee that it does not contain exceptions taken to his rulings, when there is no evidence that the party complaining took any exceptions and requested them to be reported or preserved.

If the referee in his report has found the amount due from the defendant to the plaintiff as a matter of fact, and that the plaintiff is entitled to a judgment for that amount as a matter of law, the defendant can not claim to have the report set aside on the ground that the referee has not returned his finding of fact and law separately.

Where all the issues are referred to a referee, the prevailing party need not give notice of the report, or furnish to the other party a copy of it. A judgment may be entered upon it as upon a verdict of a jury, without a motion.

**IN GENERAL TERM ON ERROR.**—This was a suit brought by Riley against Coghill for the dissolution of their partnership, the appointment of a receiver, and the settlement of the partnership business, and the recovery of a balance claimed as due to the said Riley. The petition was filed February 9, 1867.

On the 23d of February, 1867, Coghill filed an answer denying that he had taken wagons and other property of the firm and sold them, keeping the proceeds, as charged in the petition, and charges fraud and misconduct of the plaintiff, or of Drennan, who seems to have represented the plaintiff in the firm, and charges that he (Drennan) sold the wagons of the firm without accounting for the proceeds. The reply denies these charges.

By consent the following entry was made, viz :

“This day came the parties by their attorneys, and upon application to the court for that purpose, and it appearing that the proceedings herein are instituted for the settlement of partnership accounts and a division of the assets on hand of a partnership heretofore existing between the parties hereto, the existence of which partnership being admitted by both parties :

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"It is, with the consent of parties, therefore ordered by the court that this cause be and the same is hereby referred to Thomas B. Paxton, Esq., who is hereby appointed as a special referee to hear and determine all the issues in the action, whether of law or of fact, or both, and that said referee make report of his proceedings, findings, and decision to this court for approval and judgment."

On the 7th of March, 1870, the referee filed his report in the words and figures following, viz :

"The undersigned, Thomas B. Paxton, to whom this case was referred by the former order of this court, having heard all the evidence offered by the parties respectively, and the arguments of their counsel, do find that there is due to the plaintiff from the defendant the sum of \$1,350, with interest from the commencement of this suit, for which, with costs, the plaintiff is entitled to a judgment against said defendant.

"Referee's fees, \$300.

"This 7th day of March, A. D. 1870.

[Signed,] "THOS. B. PAXTON, *Referee.*"

On the 14th of March, one week after the filing of this report, a judgment was entered thereon in accordance with its finding of fact and law.

On the 30th day of March, 1870, the counsel for the defendant filed a motion in these words, "Motion to open up judgment, the same having been irregularly taken." Signed by defendant's counsel, and dated March 29, 1870.

In the following term, viz: on the 13th of April, 1870, the defendant filed "a motion to open up judgment" in the same words as before, adding seven grounds or specific irregularities complained of.

*Yaple & Healy*, for plaintiff.

*Long & Kramer and Warden & Ludlow*, for defendant.

Taft, J. This cause was a proper one for a reference. We shall consider the grounds of this motion to set aside the



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report in their order, independent of a subsequent statement by the referee placed upon file, and to the filing of which objection was made by the defendant's counsel. We will see how the case would have stood without any such statement from the master, and if these irregularities had been pointed out during the term with the first motion. The first irregularity complained of was, "that exceptions taken to ruling and decision of referee during the trial and examination before him had not been returned with his report to the court."

It would be a conclusive answer to that complaint that the court had no evidence that any such exceptions were taken, unless resort be had to the subsequent statement of the referee, to which the defendant's counsel object and except.

The second irregularity complained of was, "that the referee had not stated the facts found and the conclusions of law separately." He did find the amount due from the defendant to the plaintiff as a matter of fact, and that the plaintiff was entitled to recover that sum from the defendant as a matter of law. This we regard as sufficient in form.

The third complaint was that "the decision was made by the referee, and his report filed without notice to the defendant, without his knowledge, and without opportunity to except thereto."

But there is nothing on the record to show any such want of opportunity, nor does the defendant present any evidence, unless it be the very statement of the referee, to which defendant objects as incompetent.

"Where all the issues are referred to a referee, the prevailing party need not give notice of the report or furnish a copy of it. Judgment is of course." *Van Steenburgh v. Hoffman*, 6 How. N. Y. 493.

The fourth objection to the judgment was like the third, and subject to the same answer.

The fifth objection was, "that the judgment purported to have been entered upon the motion to confirm the report of the referee, and for the entry of judgment thereon, when no motion was ever made."

Here again the entry of the judgment itself was the only evidence which showed there was a motion. But as no motion was necessary, it was quite immaterial whether a motion was made or not, and whether it was oral or written. A judgment follows on the finding of a referee as it does on the finding of a jury, without any motion.

The sixth objection was, that "the judgment purported to have been made after the court had carefully examined the report and the evidence, when no evidence whatever was returned by the referee."

As the order of reference did not require any report of the evidence, the court might well take the evidence to be in accordance with the report, which was what the court asserted in the entry of the judgment.

The seventh objection was general for informality and want of opportunity to except, which is covered by what has already been said.

Thus stands the case on the record, and the motions, with the assignment of irregularities.

But on the hearing of the motions to set aside the judgment, the referee was permitted by the court to make a statement of what took place after the cause was referred. To this the defendant objected, and now asks that the judgment be reversed, because that statement may have influenced the mind of the judge in overruling the motions of the defendant. We have seen that if the statement had not been made or filed, the court would have had no ground to sustain the motions. The error, therefore, if it were error to permit the statement, could not have prejudiced the defendant.

But if we regard that statement as competent evidence on the hearing of the motion, and so available to the plaintiff in error to show what took place, the result would,

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in our opinion, be the same. The defendant can not have part of the statement without the whole.

Taking the whole statement together, we are satisfied that it shows no ground to interfere with the finding. The parties agreed to have this cause referred to the referee for decision. There does not appear to have been any neglect on his part to take testimony, and give the parties full opportunity to present their case, and he decided it. The judge at Special Term saw no reason for refusing to render judgment upon his finding, or for setting it aside after it was rendered, and we think his ruling was correct.

The judgment is affirmed.

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JOHN RYAN & Co., Plaintiffs, v. THE CITY OF CINCINNATI,  
Defendants.

The plaintiffs were contractors with the city for grading and paving Cross street, under a contract "that compensation and payment for all work done, and materials furnished under the contract, should be made as specified in the ordinances of the city council regulating collection of special taxes for the improvement of streets," and not otherwise; and that the city of Cincinnati should not in any event be liable to pay for any part of the said work or the material used for the same, except such as may properly be chargeable upon the city property bounding or abutting on the said Cross street, agreeably to the provisions of the ordinance aforesaid.

After the work was done, the assessment was duly made and assigned, in pursuance of the contract, to the plaintiffs, and by them accepted, in consideration whereof they released the city from all claim on account of the work done and materials furnished under the contract for doing said work.

*Held*, that the city was not liable to an action by the contractors for the excess of the assessment above fifty per cent. of the value of a lot abutting on the street, which excess the contractors had failed to recover against the owner of the property.

IN GENERAL TERM ON PETITION IN ERROR.—The original petition stated that the plaintiffs, under a contract

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with the city, made June 9, 1869, graded and paved Cross street, from Hamburg street, 333½ feet westwardly; that the city assessed the cost by ordinance on the owners of property fronting on the street improved; that the estate of N. Longworth, deceased, resisted the payment of the assessment upon certain lots belonging to it, on the ground that the assessment exceeded fifty per cent. of the value of the lots; and on a trial it was found by a jury that the assessment against the lots did exceed the fifty per cent. of their value by \$1,533.83, which amount the plaintiffs seek to recover against the city.

The contract under which the work was done, and the assessment made, for which the plaintiffs seek to recover, provided "that compensation and payment for all work done, and materials furnished under the contract, should be made as specified in the ordinances of the city council, regulating collection of special taxes for the improvement of streets," "and not otherwise; and that the city of Cincinnati should not in any event be liable to pay for any part of the said work, or the material used for the same, except such as may properly be chargeable upon city property bounding or abutting on the said Cross street, agreeably to the provisions of the ordinance aforesaid."

It was also averred, in the answer, that the city had no property bounding or abutting on said street. There is no claim that the assessment was not made according to the ordinance to which it refers, and which thus became, in part at least, part of the contract. And after the work was done and the assessment duly made, it was, in pursuance of the contract, transferred to the plaintiffs, who also, in pursuance of the contract, gave the following receipt and release, viz:

" CITY AUDITOR'S OFFICE, }  
CINCINNATI, October 16, 1869. }

"Received of C. H. Titus, city auditor, a certificate of the whole amount of the costs and expenses estimated for grading and paving Cross street, from Hamburg street to

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834½ feet west, under the ordinances of the city council for that purpose, and of the amount assessed upon each lot delineated and described in the city engineer's plat.

"And in consideration thereof, we do hereby release the city of Cincinnati from all claim on account of the work done and materials furnished under the contract for doing said work, from \_\_\_\_\_, to \_\_\_\_\_, between the said city, by her auditor, and the said John Ryan & Co.

[Signed,]

"JOHN RYAN." [SEAL.]

*Long & Kramer*, for plaintiffs.

*Walker, Conner & Warrington*, for defendants.

TART, J. The plaintiffs rely upon the provision in the act of April 13, 1865, authorizing municipal corporations to levy assessments for the improvement of streets, etc., "that in NO CASES shall the tax levied and assessed upon any lots or lands, for any improvement authorized by this section, amount to more than fifty per centum of the value of said lot or land, to be estimated after the said improvement has been made, and *all* the cost of said improvement. *exceeding* said per centum, that would otherwise be chargeable on said lot or land, *shall be paid* by the municipal corporation out of its general revenue."

The contract in the present case was made, as we have seen, in 1868, since the enactment of the statute relied on. The plaintiffs claim that the ordinance under which the contract was made was passed in 1850, long before the statute referred to, and it must, therefore, be interpreted without reference to the fifty per cent. limitation under the statute of 1865, or as impliedly excepting the excess above fifty per cent. of the said property to be paid by the city. Although the ordinance was adopted in 1850, the contract speaks as of 1868, when it was made, and we have to read it as of that date to ascertain what it means. Thus

reading it, we can put no construction upon it consistent with the city remaining liable for the excess above fifty per cent. of the value of any of the lots fronting on the street improved. The language is sweeping, and we know no canon of construction by which we can insert the exception claimed by the plaintiffs.

The contract is express that the plaintiffs shall rely upon the assessment made according to the ordinance, and in no event hold the city liable for any part of the work or material. It would be entirely inconsistent with, and a contradiction of this contract, to hold that the city is nevertheless liable for the cost above fifty per cent. of the value of any lot fronting on the street.

The next question is, whether the contract thus construed is binding upon the plaintiffs. So far as it relieves the city of the cost of the improvement above fifty per cent. of the value of the assessed property, it is an evasion of the statute of 1865, and tends to increase the assessment on other property. But the plaintiffs are parties to the contract, and have had and are seeking the benefit of it, and they can not, in the face of it, claim to recover this sum from the city. This is the result of the recent decision of the Supreme Court, in *Welker v. Toledo*, 18 Ohio St. 452, which case we regard as identical in principle with the present, where it was held "that in such cases the contractor himself can not, in violation of his own contract, recover the excess from the city."

The only difference between that case and the present is, that in that case the contract was that the contractor should not have recourse upon the city for the excess of the assessment above fifty per cent. of the value of the lot assessed, while in the present case the contract is that the city shall in no event be liable to the contractor for any part of the work or material. But, in our opinion, the contracts must receive the same construction so far as the alleged liability to the contractor is concerned.

Judgment at Special Term is affirmed.

THEODORE COOK v. WESNER AND WIFE AND BROWN AND  
WIFE.

When words in a deed, clearly granting an estate without limitation, are followed by others excepting a part of the estate granted, the part intended to be excepted must be as clearly described as the property originally conveyed, to give any force to the exception or limitation.

A. conveyed all his interest in lands to B., but in the deed, subsequent to the granting clause, were inserted words declaring the intention was to convey only a part of A.'s interest.

*Held*, that A. was estopped, and that his whole title passed.

**SPECIAL TERM.**—The plaintiff filed a bill to quiet title to certain real estate, which had been conveyed to him by one Ferguson, who had purchased it at sheriff's sale under a decree in chancery. It was sold as the estate of James Harrison, who had mortgaged to Wesner and wife and Brown and wife to secure the payment of purchase money for their interest therein, and had been originally owned by Mr. Harrison, who died, leaving James Harrison, Eliza A. Harrison, Theodore Harrison, Mrs. Wesner, Mrs. Brown, and Richard Harrison, Jr., his children and heirs at law. Subsequently, Eliza and Theodore died without issue, their surviving brothers and sisters being entitled to their interest as tenants in common. In October, 1855, Wesner and wife and Brown and wife conveyed by deed all their interest in the property, describing it by metes and bounds. At the time of their conveyance, they were entitled not only to their shares in the estate of their father, but also to what they inherited from their deceased brother and sister.

The point made by the defendants was, that certain words following the grant of the property in the deed above mentioned, limited the extent of the estate they intended to convey. These words were, "The object of this deed is to transfer all the estate the grantors derived

from Richard Harrison, their father, and Richard Harrison, Jr., their brother."

*Lincoln, Smith & Warnock*, for plaintiff.

*Sayler & Sayler*, contra.

STORER, J. Wherever words of grant, clearly describing the property without limitation or restriction, are afterward followed by an exception as to part of the estate intended to be granted, the exception must so clearly describe the property intended to be excepted that there can be no doubt as to what the intentions of the parties were. As deeds are always taken more strongly against the grantor, mere words of description, which do not in themselves clearly limit the estate already granted, have not been construed to restrict or narrow the property described in the conveyance.

If, in the present case, it had been stated in the deed the object was to convey the interest the party had in the estate by virtue of any deed from a person who never owned it, or if a mistake should be made in the original transfer to the parties who made the grant, such language will be taken merely as descriptive, and, if it is necessary, will be rejected altogether in favor of the grant already made. A false description in the conveyance of property never affects the grant itself if there is sufficient to give it a legal sanction.

Thus, it has been held that if a conveyance is made by A. to B. of a lot described by a number, as recorded on a town plat, and the lot itself should afterward be described as located in a different part of the city from which it really was, the words first used will pass the estate, and those which are appended by way of explanation will be rejected.

And so if a grant be made by A. to B. of a farm, and it should be described as being in a certain township, but there should be in the deed words to the effect that the



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farm is the same property now occupied and owned by the grantor, a mistake in the township or range would be disregarded in order to give effect to the grant.

We think the defendants, who now set up that the parties did not intend to convey certain portions of the property, must be precluded from availing themselves of the language used in the deed. They have by express words conveyed their whole estate, and a subsequent alleged limitation can not affect the conveyance.

A decree will be rendered for the plaintiff quieting his title.

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THE HEIRS OF AUGUSTUS C. PARRY v. THE TOBACCO INSURANCE COMPANY ET AL.

A. leased lands to B. by deed, with covenants that B. should pay all taxes and assessments, and rent quarterly—lease to be forfeited by default in payment of rent—with privilege of purchasing the fee within the term. The lessee made default in paying rent and taxes; the lessor entered and sold the fee. Subsequently, before the expiration of the term, the heirs of B. tendered the contract price for the fee, which was refused. On their suit for specific performance:

*Held*, that the payment of the rent and taxes was a condition precedent on the lessee's part to the exercise of his option to purchase; that the non-payment of rent and taxes was such a default as barred him from asking specific performance.

RESERVED TO GENERAL TERM.—On April 4, 1856, Robert B. Bowler, now deceased, executed to Augustus C. Parry an agreement in writing, by which he leased to Parry a lot at the northeast corner of Front and Vine streets, in Cincinnati, twenty feet front, to be held by Parry and his assigns from the 27th of that month for a term of ten years, at an annual rent of \$600, payable in quarterly installments, the lessee to erect a substantial building upon the premises before the expiration of the term, and to pay all

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taxes and assessments that might be levied on the property, with the proviso if the quarterly installments of rent should not be paid within thirty days after the time they severally became due, the lease should be forfeited after demand for payment made by the lessor.

The same stipulation was made as to unpaid taxes and assessments. There was a privilege of purchase of the fee at any time within the ten years at \$300 a front foot, and on such a contingency the lessor agreed to give a deed of general warranty, with release of dower. This agreement was executed in due form, acknowledged, and recorded.

Under this lease the lessee entered and kept possession of the premises till July, 1858, since which time neither he nor his heirs have been in possession, nor has any rent been paid by him or them.

On the 23d of April, 1866, before the expiration of the term of ten years, and after the decease of Bowler, the lessee, Parry, expressed to Bowler's heirs his intention to avail himself of the privilege of purchase, and tendered the \$6,000, demanding a deed with the covenant named in the lease, which was refused.

Previous to this, from 1858, after Parry had vacated the premises and made no provision for the payment of rent or taxes down to 1863, the lessor was compelled to pay the taxes. On the 23d day of April of that year, the taxes the lessor had paid to prevent a forfeiture to the State amounted to \$321.70, with interest. On the day last named he sold the property to one Schultz, and by conveyances through him to Glenn and Cooke it became vested in the Tobacco Insurance Company of Cincinnati. The premises had meanwhile greatly increased in value, being worth more than double the amount named in the lease as the purchase price.

Parry having died, this suit was brought by his heirs, asking a specific performance of the covenants of the

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lease, and the heirs of Bowler, together with the subsequent proprietors, were made parties defendant.

STORER, J., in giving the opinion of the court, said:

This privilege of purchase secured the right to the lessee to compel a compliance by the lessor, leaving it optional entirely with the lessee, but it must be admitted that the privilege was dependent upon the performance of the covenants to pay the annual rent and taxes. A refusal to discharge the obligation in this respect, which would defeat the right of the lessee to hold during the term stipulated for the possession of the premises, must necessarily put an end to the right of purchase.

Under these circumstances can we decree a specific performance against the defendants? We need not refer to the established doctrine that we are not bound to grant in any case such a decree as a matter of course. We are to exercise a sound judicial discretion, taking into consideration the conduct of the parties, as well as the condition of the property to be affected.

On this point there has been no uncertainty as to the law in this State from the earliest reported case in our courts until the present time. Thus, it was held in *Hutcherson v. McNutt*, 1 Ohio, 14, decided nearly fifty years ago, "that a party demanding specific performance must show that he is in no default, unless he can account for such default by special circumstances, and if it be unexplained, or if he can not perform the whole of the contract on his part, he can not compel the other side to perform what otherwise he might require him to do. And for the same reason, when he has trifled or shown a backwardness on his own part, equity will not aid him."

If he omits to execute his part of the contract by the time appointed for the purpose, where there is no acquiescence in the omission on the part of the defendant, the court will not interfere.

In *House v. Beatty*, 7 Ohio, pt. 2, p. 84, this rule was recog-

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nized, the court holding that after the lapse of a reasonable time for the performance by the plaintiff, from his omission of the duty required on his part by the contract, a relinquishment by him of the contract might be presumed. See *State v. Baum*, 6 Ohio, 383; *Brown v. Haines*, 12 Ohio, 1; *Henry v. Conn*, Ib. 193; *Kirby v. Harrison*, 2 Ohio St. 326; *Campbell v. Hicks*, 19 Ohio St. 433. The law as thus expounded has been the rule of all our judicial action, and is founded on the broadest equity, leaving the judge at last to adapt it as the circumstances of each case may require its application.

Nor can there be any distinction in the operation of the rule between cases where the contract is to purchase absolutely, and when a privilege or option only is secured to the lessee. In both the principle is the same; the vendee can not avail himself of his right unless he has been ready, willing, and able to pay the price agreed on, as he has stipulated to do, or to perform his contract whereby alone the lease is upheld. He can not, after default in either case, apply to the chancellor for relief. A breach of a covenant, which is a condition precedent to a claim by the covenantor against the covenantee, can not be disregarded when equity is invoked by him who is in default. He must do equity before he can ask it.

It has been urged that as there has been no judicial determination of a forfeiture of the lease for the default of the lessee in the payment of rent and taxes, the privilege of purchase secured by the lease has not been affected. But we can not appreciate the position thus assumed, for it is obvious the proposition is legally untenable. It is for the lessee's default, whether caused by neglect or by a positive refusal to discharge his covenants, that we may refuse to grant relief; not whether a decree has been entered, which would *ipso facto* deprive the lessee of any privilege he might otherwise have enjoyed.

On the whole case, it is apparent that the plaintiffs are not entitled to a decree. Their father voluntarily aban-

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doned the premises leased in 1858, paid no rent or taxes, and subsequent to that time, when rent was demanded, confessed his inability to pay. In the meantime the value of the property has more than doubled, and not until it had risen so rapidly in price, and after third parties had acquired title, and a very short time before the lease expired, a tender was sought to be made. If the value of the premises had fallen below the price to be paid, it is not probable any tender would have been made. The lessor alone must then have borne the loss; the lessee could not be compelled to make the purchase, as no legal objection existed upon him to do so.

To decide against the defendants would give an advantage to the plaintiffs that neither law nor equity should permit.

The prayer for specific performance is denied, and the bill dismissed with costs.

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THE CINCINNATI COLLEGE ET AL., Plaintiffs in Error, v. THE CITY OF CINCINNATI, T. A. NESMITH, ET AL., Defendants in Error.

On motion to dissolve an injunction, the court granting the motion ordered a bond of indemnity to be given by the defendants to the party who had obtained the restraining order, to save the plaintiffs harmless and be liable for future damages. On the plaintiffs seeking to reverse the order on writ of error:

*Held*, that it was not a final order or judgment to which, under section 512 of the Code, a writ of error could lie.

*McGuffey, Morrill & Strunk*, for plaintiff.

*Walker, City Solicitor, and Hoadly, Jackson & Johnson*, contra.

RESERVED TO GENERAL TERM.—At Special Term a motion was made by the defendants to dissolve a restraining order that had been granted to prevent the use of Wal-

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Cincinnati College et al. v. City of Cincinnati et al.

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nut street, Cincinnati, for the car track and route of a street railroad, better known as "Route No. 9." It was argued by the plaintiff on the ground of irremediable injury to the plaintiff if the defendants were permitted to occupy the thoroughfare, and by the defendants that the plaintiff had no exclusive right to exert and the remedy, if any such right existed, was by action at law to recover damages. The judge, at Special Term, who heard the argument, vacated the order on condition that the defendants should enter into an undertaking, with sufficient surety to the satisfaction of the clerk, in the sum of \$10,000, conditioned to indemnify and save harmless the plaintiff from all damage which might accrue and arise from the dissolution of the restraining order, as well as to comply with any order the court might subsequently make.

To this order the plaintiff filed its writ of error in the General Term, which the defendants moved to dismiss.

STORER, J. We are now asked to reverse the action of the court in Special Term for alleged error, and the defendants move to dismiss the writ of error, on the ground that the proceeding sought to be reversed is not such a judgment from which a writ of error will lie. The cases of *Worthington v. Rogers*, decided by this court November last, and *Taylor et al. v. Fitch*, 12 Ohio St. 169, we think decide the question. They give a legal construction to section 512 of the Code, which defines the meaning of a final order, which in effect determines the action and prevents a judgment.

The writ of error will be dismissed and the cause remanded.

**ALICE KEATING v. JAMES SHERLOCK, Surviving Partner, and  
H. S. BREWSTER, Administrator of Edward Sherlock, de-  
ceased.**

The holder of a firm note, after dissolution of the firm, received the individual note of one partner for the amount without new consideration.

Payments on account were made on the second note.

*Held*, that the second note was not a payment of the first nor an extinguishment of the firm liability.

RESERVED FROM SPECIAL TERM on demurrer to answer.

*Challen & Mitchell*, for plaintiff.

*H. S. Brewster*, contra.

STORER, J. The plaintiff in her petition states that in October, 1866, she loaned to James Sherlock and Edward Sherlock, then partners in business, \$400, for which she received their joint note. Afterward, Edward Sherlock gave her his individual note for the amount, payable in one year with interest. This was received by her not as additional security, and no new consideration moved from the defendants, or either of them, for the further extension of time. On January 12, 1871, Brewster, as the administrator of Edward Sherlock, paid to the plaintiff \$216.24 on account, and she now brings her action to recover the balance upon her loan to the partnership.

The answer of James Sherlock admits the debt of the copartnership, the existence of the joint note of the partners, but claims the firm was dissolved in the lifetime of Edward Sherlock, who gave the second note described in the petition, because he was bound by the terms of the dissolution to pay the debts of the partnership. He admits the payment, by the administrator, of the sum credited in the petition on the note of Edward Sherlock, whose estate had been declared insolvent. On these facts he relies as a defense to the plaintiff's action.

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Keating v. Sherlock et al.

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We find the same facts alleged in the answer of the administrator of Edward Sherlock.

To both answers the plaintiff has demurred.

The only question on the pleadings for us to decide is, what was the effect of the receipt by the plaintiff of the note of one partner for a debt due from both.

Whenever the note of a party to the original contract is given to and received by a creditor, the transaction can not be regarded as payment of a debt due, unless a new consideration is proved for any extension of the original contract, or the condition of the parties has thereby been changed, or unless it would be inequitable to permit a recovery upon the former claim. And the burden of proof devolves upon the defendant to establish all the facts from which the intention of the parties can be inferred. This is the rule in ordinary cases, and it especially should be applied in a case like the present, where the plaintiff received no additional security for her debt or any new consideration for extending the credit—where the surviving partner has lost nothing by the substitution of his brother's note for the partnership liability—more especially as the person with whom Edward Sherlock dealt was a female, who can not be supposed to have known the legal consequences it is now claimed necessarily follow the execution of the note.

Without referring to the cases, we need only quote the opinion of the Supreme Court in *Leach v. Kagy's Adm'r*, 15 Ohio St. 169, where it was held, "That a note of a surviving partner, given to the creditor of the firm on an adjustment of such creditor's claim against the firm, will not be regarded as given and received in satisfaction of the firm debt, unless the testimony affirmatively and clearly shows such to have been the agreement of the parties."

This adjudication covers the whole case, and the demurrer to the answers will be sustained and judgment entered for the plaintiff.



LEWIS A. CORBIN, impleaded with others, v. GEORGE  
F. BOUVE.

C. brings replevin against B., who, in his answer and cross-petition, sets up an equitable defense and claim to the property. C. replies; and in his answer to this cross-petition pleads a set-off, and demands judgment for money only arising from other transactions on an account stated.

*Held*, that such a claim was not included in the provisions of section 80 of the Code, and could not be pleaded as a set-off in this action.

Damages for which an action for money had and received or *indebitatus assumpsit* can be maintained, may be pleaded as a set-off.

The proceedings are not affected by the fact that the sheriff is unnecessarily a party to them. He should be dismissed.

GENERAL TERM.—Reserved from Special Term on motion to strike out from the answer to the cross-petition a claim of set-off.

The facts are fully stated in the opinion.

*Stanton & Richards*, for the motion.

*King, Thompson & Avery*, contra.

HAGANS, J. The plaintiff brought an action of replevin for certain household furniture, action 26,744, in which the defendant pleaded the general issue. When the sheriff was about to execute the writ, the defendant brought suit, action 26,747, and obtained an injunction against the plaintiffs and the sheriff to restrain the execution of the replevin, on the ground that there was a previous contract between the parties, by which it was agreed that if the defendant would execute a bill of sale of the property above mentioned, as security for an indebtedness from the defendant to the plaintiffs on a previous partnership account, they would allow him to retain the possession of the chattels until he was able to pay the debt, and that part of the agreement was that the defendant was to be a partner

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Corbin et al. v. Bouve.

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with the plaintiffs in a new partnership in the business they were then carrying on, and that while the defendant signed the bill of sale, the plaintiffs refused to sign the contract on their part, and sought to remove said chattels from his residence, which would inflict great and irreparable damage to himself and family, and he asks that the bill of sale be declared void.

To this last petition the plaintiffs in the first action filed an answer, in which they deny any such agreement as stated, and allege that Bouve wrongfully bought these chattels with the money of a previous firm, and the bill of sale was made to restore the money to the plaintiffs, who had succeeded to and owned the previous firm's assets. And by way of set-off, as it is called, they set up an amount of indebtedness on the part of Bouve of \$12,398.84, for which they asked judgment.

Bouve moved to consolidate the two cases as case 26,744, and that his petition asking for an injunction be taken as an answer and cross-petition, and also to strike the answer in 26,747 from the files. The motion to consolidate was granted as asked, and the motion to strike the answer from the files refused. Thereupon, the defendant moved to strike out of the answer so much thereof as pleaded the set-off, and this motion has been reserved to General Term.

It was claimed that these were unliquidated damages, and therefore not the subject of set-off. But an action could be maintained for the amount on a count in *assumpsit* for money had and received, or *indebitatus assumpsit*, and it seems to us would be properly pleaded if that were the only objection. *McCullough v. Lewis*, 1 Disney, 565.

It is said that if the plaintiff's petition in the injunction case be taken as an answer in the consolidated action, as by the order of consolidation it is directed to be, then the defendant's answer in the injunction case must be held to be a reply in the consolidated action, and that a set-off can not be pleaded by way of reply. But this claim overlooks

the fact that the petition praying for an injunction is directed to be a cross-petition as well as an answer in the consolidated case. The answer and the set-off, therefore, in the injunction case is an answer to the cross-petition in the consolidated case, and the defendant in the consolidated case might have leave to reply to the set-off if it were proper to consider it at all. Something was said in the argument about the incongruity of the actions, and that the consolidation was improvidently allowed. Exception was taken to the order of consolidation. Certainly the replevin can not proceed while the injunction is pending, and the injunction can not be determined until the pleadings are perfected and trial had. The matters involved in the petition and answer in the injunction case lie at the foundation of the replevin case. The replevin case stands on a contract growing out of certain partnership transactions. The indebtedness, at least to the extent of the bill of sale, would seem to be admitted by Bouve, but whether the lien alleged, which is the foundation of the replevin, is good, must depend upon the contract as established by the evidence. But what connection the alleged set-off has with the litigation we are unable to see. It is said to be a set-off as the pleadings now stand. The plaintiffs bring replevin; the defendant answers setting up an equitable defense and cross-petition demanding the property, and the plaintiffs reply and answer denying the defense and pleading a set-off, setting up a claim on an account stated exceeding the debt, which is the foundation of the plaintiffs' replevin, and for an indebtedness which, so far as we can see, has no connection with the cause of action, and which depends on a settlement of partnership accounts, demanding a personal judgment for \$12,398.84, to which the defendant might reply if it were properly in the action.

As the pleadings stand, the case is substantially an action of replevin, and an action on an account stated and *indebitatus assumpsit*. These can not be joined in the same action, and the state of the pleadings can not vary the fact.

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Reynolds et al. v. Green.

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By section 80 of the Code (2 S. & C. 967), the plaintiffs may unite several causes of action, legal or equitable, or both, when they are included in either one of several classes, the fifth of which is "claims to recover the possession of personal property with or without damages for the withholding thereof." It is very clear to us that the set-off claimed does not belong to this class, and it is excluded from the action by the Code. The fact that the sheriff has been imported into the case does not affect the proceedings. He need not have been made a party and ought to be dismissed from the action. *Oliver v. Hungerford*, 10 Ohio, 272; *Allen v. Medill*, 14 Ohio, 442.

Motion granted.

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JAMES REYNOLDS ET AL. v. SAMUEL M. GREEN.

A suit to enforce the contractor's lien on real estate for paving and grading assessments is barred by the same limitation as a personal action to recover the debt.

**ERROR TO SPECIAL TERM.**—This is an action to enforce the lien of an assessment on real estate of the defendant, situated on Front street, for grading and paving. The petition was filed on March 1, 1867, and a demurrer thereto sustained. An amended petition was filed November 16, 1869, to which a general demurrer was filed, on the ground that the petition disclosed the fact that the claim sued on was barred by the statute of limitations.

On the day of the filing of the original petition, a summons was issued, and returned "not found." Service by publication was then had, the first notice being published on November 30, 1867.

The petition stated that on the recommendation of the board of city improvements, the city council did, on March

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15, 1861, duly pass the ordinance providing for the paving and grading of Front street, and authorized a contract with the plaintiff, which was executed May 3, 1861; that the work was done; that on the 20th of November, 1861, the assessment on the property was made, and that on November 29, 1861, the city commissioner of the Eastern district certified that the work had been done according to the terms of the contract.

The demurrer to this amended petition was sustained by the judge at Special Term, and judgment entered for the defendant. To reverse this judgment a writ of error was prosecuted to the General Term.

*S. A. Miller*, for plaintiff in error.

*Van Hamm*, contra.

HAGANS, J. By section 20 of the Code (2 S. & C. 949), "an action shall be deemed commenced within the meaning of this title, as to each defendant, at the date of the summons which is served on him, or a co-defendant who is a joint contractor, or otherwise united with him in interest. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication, which publication shall be regularly made."

There is but one defendant, and no summons was served upon him. The first publication was made November 30, 1867. The cause of action accrued November 20, 1861, when the assessment was made on the defendant's property, and the demand of the petition is for interest from that date. The city commissioner's certificate is dated November 29, 1861; but that is conclusive only as to the amount and value of the work done. *Ridenour v. Saffin et al.*, 1 Handy, 464.

It simply dispensed with other or further proof in those respects in the absence of fraud or collusion. It will thus

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be seen that the action was not commenced for more than six years after the cause of action accrued.

In *Espenschied v. Bloebaum*, decided in this court about a year ago, the defense of the statute of limitations was by answer that the cause of action had not accrued within six years next before the commencement of the action, and the defense was held good on demurrer. The court said in that case, "Although there does not appear to have been any statutory limitation to the lien sought to be enforced, we may well follow the rule prescribed as to the recovery of the supposed debt. We recognize the rule adopted by the Supreme Court in *Longworth v. Hunt et al.*, 11 Ohio St. 194, where it is held that the limitation in such cases applies in equity as well as at law."

The cases cited to us in the argument—2 Duer, 1; 2 Kernan, 140, and 2 Barr (Penn.), 437—were all cases under acts furnishing special limitations for this class of cases. On a review of these cases and the authorities cited to us in *Espenschied v. Bloebaum*, we see no reason to change our opinion.

Judgment affirmed.

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ROBERT GROFF, Adm'r of John H. Groff, deceased, v. THE  
CINCINNATI AND INDIANA RAILROAD COMPANY ET AL.

In an action against a railroad company for injury done to one of its employes, through the want of repair or careless construction of a bridge, it is no defense that the employe knew beforehand the condition of the bridge, and in the discharge of his official duty ventured thereon.

In an action for the death of an intestate caused as above, brought by an administrator for the benefit of the next of kin, the jury in assessing damages should look not merely to the degree of relationship the deceased bore to his kindred, but his condition of life at the time of his death, and the reasonable expectation they might have had of pecuniary assistance from him if he had survived.

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RESERVED TO GENERAL TERM on motion for a new trial.  
The facts appear in the opinion.

*Sayler & Sayler and Carter Gazley, for plaintiff.*

*D. Thew Wright, contra.*

STORER, J. This action is brought to recover damages against the defendant, under the provisions of the act of March 25, 1821, requiring compensation for causing death by wrongful act, neglect, or default.

The intestate, John H. Groff, engaged as a fireman upon one of the defendant's locomotives, was killed while crossing a bridge temporarily erected over the Whitewater river. It was charged in the petition that the accident was caused by the imperfect structure used as a bridge, it having been built of bad material, and erected carelessly and unskillfully, wherefore the engine, in passing over, was precipitated to the bottom of the river and the intestate killed.

A denial of the facts set forth in the petition is found in the answer, with an averment that the deceased was in fault at the time the bridge fell down, and might have escaped all injury if he had exercised ordinary care himself in performing his duty as fireman.

On the trial at Special Term a mass of testimony was read, which is minutely stated in the bill of exceptions; many instructions were asked by both parties, some of which were refused and others given, involving for the most part the law which is so often discussed in cases where negligence is the *gravamen* of the action.

The court also charged upon the general question, covering, as we think, the whole ground of the controversy, and deciding, as we believe rightly, the law regulating the liability of the parties.

A verdict was rendered for the plaintiff, and damages assessed at \$2,500. A motion for a new trial followed the verdict, which has been reserved for our determination

here, with all the questions involved in the evidence and the pleadings.

One of the questions, to which it appears the attention of the court was mainly directed, was, that if the bridge was badly constructed, or was otherwise unfit for the purpose of bearing the weight of the locomotive, and the fact was known to the deceased, he should not have exposed himself to injury by remaining on the engine while the train was crossing the bridge. In other words, it was assumed that an employe of a railroad company, who has engaged himself in its service, may be permitted to abandon his duty at any point in the usual line of travel when he either suspects or may have good reason to anticipate danger before him; nay, further, that although a locomotive had previously passed over the structure in safety, and no signal of peril was given when the engine approached the bridge, even if since the bridge had last been used a sudden rise in the river should be the immediate cause of weakening its foundation, the act of the fireman may be held to imply *per se* a want of prudence on his part, and thus establish a case of mutual fault where both parties are to be blamed, and there can be no remedy for the neglect of either. But the evidence on this point was before the jury, and the charge of the court clearly defined how it should be applied, either to sustain the plaintiff's action or to defeat it, and their verdict establishes the fact that the accident was the consequence of a defect in the bridge, and negatives any neglect on the part of the deceased.

So far, then, as the liability of the defendant is concerned, we find no error in the finding of the jury as to the fact, or in the rulings of the court.

Another question arises upon the record as to the extent of the damages that should be allowed in a case like this, where it is averred the brothers and sisters of the deceased, as the next of kin, are alone entitled to participate in the amount of the recovery.

Since the statute of 9 and 10 Victoria, chap. 93, secs. 1



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and 2, which owes its origin to Lord Campbell, and the subsequent legislation on the subject in those States of our Union which have followed the remedy first given in England, we find the object of the enactments has been to provide a remedy for a real loss—not where those bearing the relation of next of kin, without any claim on the support of a deceased relative, or who never have depended upon him while alive for aid, shall administer upon the dead body and divide it as assets, when perchance they have not furnished, or were unable to furnish, a burial for the intestate. On the principle that those who represent as kindred him who has died from the unlawful or negligent act of another are theoretically entitled to bring their action, as the statute says, for the death, it does not follow they should be regarded as a wife or child would be in deciding a question of this kind.

In the case of *Pym v. The Great Northern Railway*, 4 Best & Smith, 396, Earle, C. J., said that the right to damages is based on the reasonable expectation of pecuniary advantage from the continuance of the deceased's life. This ruling had already been made by Pollock, C. B., in *Franklin v. Southeastern Railway Co.*, 3 H. & N. 211. And our Supreme Court, in *Lyons v. Cleveland and Toledo Railroad Co.*, 7 Ohio St. 341, while they held the special circumstances need not be stated upon which the plaintiff's claim is founded, yet it might well be concluded that the statute gives a right of action, and seems to regard the widow and next of kin as sustaining a nominal pecuniary injury in all such cases for the wrongful act of the defendant.

The case before us presents a claim by collateral kindred for damages, when the deceased, for whose death they bring the action by an administrator, who appears to be one of the kindred, was a very poor man, his only property being his monthly wages as fireman, and without any reasonable expectation of any anticipated advantage to either of them if he had survived.

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*Duval v. Febiger.*

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Upon the whole, we think the damages allowed by the jury were excessive, and a new trial should be granted, unless the plaintiff remits \$1,500. If he shall consent to this remission, judgment may be entered for the residue. The judge who tried the cause at Special Term concurs fully in this opinion.

A remittur being entered, judgment was entered for \$1 000.

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FANNY DUVAL v. ELIZABETH H. FEBIGER.

D. mortgages certain real estate to C., his wife joining and releasing her dower. C. assigned the mortgage to S., and D. afterward conveyed to S. the equity of redemption, his wife not joining in the deed, and then died:

*Held*, that as after the mortgage D. had but an equity of redemption, the conveyance thereof by him to S. merged the debt in the higher title, and did not revive the right of dower of the wife of D. in the premises.

ACTION FOR DOWER RESERVED TO GENERAL TERM on agreed statement of facts, which appear in the opinion.

*Paddack*, for plaintiff.

*Ware & Disney*, contra.

HAGANS, J. Jonathan Duval, the deceased husband of the plaintiff, derived title to certain premises from Jonathan Coit by deed of general warranty, dated July 20, 1831, in consideration of \$1,600. On the same day his wife, the plaintiff, joining and releasing her dower, he made a mortgage on the same premises to Coit to secure the payment of two notes, one for \$617 and one for \$858,

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due respectively May 13, 1832, and May 13, 1833, both notes being dated May 13, 1830, and this mortgage was recorded July 23, 1831. Coit assigned this mortgage to E. C. Smith, as follows: "For value received I transfer and assign this mortgage to E. C. Smith, who has paid the amount due on the same," which assignment was recorded November 29, 1835. On June 12, 1832, Duval, in consideration of \$2,000, conveyed the same property to said Smith, by deed of general warranty, in which the plaintiff did not join. Smith died seized of the said property, and devised it, together with other real estate, to trustees for his heirs at law. On partition, the premises in question were set off to Mary Smith, his widow, for her dower, and the fee thereof became finally in the defendant, against whom this action is brought. It further appeared that among the papers belonging to the estate of E. C. Smith, there were seven promissory notes made by Duval in his lifetime to Smith, to the aggregate of \$8,850, together with a number of other papers, showing large dealings between them; but these notes, etc., were admitted as evidence subject to exception.

It does not seem necessary to admit these papers, as the mortgage from Duval to Smith, and the subsequent conveyance of the mortgaged premises to Smith after default of payment, would on its face, in the absence of any testimony to the contrary, seem to be with sufficient consideration, and the conveyance of the property to the mortgagee certainly satisfied the mortgage, which thereafter had no effect, though uncanceled of record. *Jennings v. Wood*, 20 Ohio, 261.

It is said the mortgage from Duval to Smith was not, as is apparent from the transaction, a purchase money mortgage. If it had been, there would have been no necessity for the wife's joining in it. But the wife, the present plaintiff, did join in it, and the question is, whether she has dower after the subsequent conveyance of the equity of redemption by her husband to the holder of the mortgage.

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It is said again, that by the terms of the assignment from Coit to Smith the mortgage debt was "paid," and that therefore the plaintiff can have dower. If that assignment had been to a third person, a stranger to the title, we do not think the word "paid" would be construed to mean satisfaction, but rather as a term which, taken together with the whole assignment, expressed the consideration of the transfer, and not the extinguishment of the debt. We see no reason why, even in this view, we should hold differently in this case if there were nothing more. But the holder of the mortgage was the grantee in the deed from the mortgagor. Although the mortgage debt became thereby merged in the higher title, we do not see that at the same time the right of dower revived; for Coit, the mortgagee, became thereby a purchaser of the right of dower and owned it, if it were necessary to extinguish the debt, and Smith succeeded to all his right by the assignment. The husband of the plaintiff had, after the mortgage, no legal estate as against the mortgagee. He had but an equity of redemption, which he conveyed to Smith, whose title then became complete. This he had a right to do, for sufficient consideration, by his own deed, and thereby defeat the plaintiff of dower. If Smith had become the purchaser under proceedings in foreclosure of this mortgage, the plaintiff would have had no dower, and the effect is precisely the same, Smith having purchased the equity of redemption at private sale. Duval, the plaintiff's husband, did not die seized or possessed of an equity even in the premises, and there was therefore no estate of which she can be endowed. *St. Clair v. Morris*, 9 Ohio, 15; *Taylor v. Fowler*, 18 Ib. 567; *Carter v. Walker*, 2 Ohio St. 339; *Carter v. Goodwin*, 3 Ib. 75.

Judgment may be entered for the defendant.

MILTON H. MILLER, Plaintiff, v. J. T. SULLIVAN & Co.,  
Defendants.

Miller gave money to Robbins to invest in leaf tobacco, with a verbal agreement that they should share the profits equally, saying nothing about losses. Robbins used the money to pay his own debts and bought tobacco in the name of Miller, giving his own acceptances for the purchase money, and pledging the tobacco for the payment of the acceptances to the defendants, who gave a bill of sale receipted in the name of Miller, which Robbins gave to Miller. Miller was unknown to defendants, and they were informed by Robbins that the purchase was for himself, though made in Miller's name.

*Held*, that Miller and Robbins are to be regarded as partners in the purchase of the tobacco, and that Miller was bound by the agreement of Robbins pledging the tobacco to secure the payment of his acceptances for the purchase money; that the defendants were not responsible to Miller for the misapplication by Robbins of the money he had received from Miller; that the receipted bill given by the defendants in the name of Miller, on receiving the acceptances of Robbins, was open to explanation, and did not estop the defendants from holding the tobacco to secure the payment of the acceptances according to their agreement with Robbins.

IN GENERAL TERM ON ERROR.

*Standish & Brown and Yapple*, for plaintiffs.

*Kebler & Whitman and Throop*, for defendants.

TAFT, J. This case comes into this court on a petition error.

The petition of Miller, plaintiff in the suit below, stated that during the month of September, 1868, he purchased seventeen hogsheads of tobacco and stored them in the warehouse of defendants in the city of Covington; that he paid for the tobacco in cash, and took from the defendants the receipted bills and warehouse receipt of the defendants for the tobacco; that afterward the defendants sold the plain-

tiff's tobacco without his knowledge and pocketed the proceeds, and refuse to pay over any part of them. The amount of his claim was \$3,590.94.

The defendants, by answer, denied all the allegations of the plaintiff; denied that they made any purchases for him or sold any of his tobacco, or that they are in any manner indebted to him.

From the bill of exceptions, it appears that John I. Robbins was a purchaser of tobacco from the defendants from time to time. He was a manufacturer of tobacco and a dealer in the article.

It appears that he was accustomed to purchase of the defendants, giving acceptances for the purchase money at sixty or ninety or some other number of days, leaving the tobacco in the warehouse of the defendants, as the defendants claim, to remain as security for the payment of the drafts.

The clerk of the defendants gave a receipted bill for this tobacco, on receiving the acceptances, and blank tickets or orders for the delivery of the tobacco.

We are satisfied, however, that these tickets were not, by the usage of the trade, intended to convey a right to the property without paying for it. They were mere blank orders and could bind nobody.

The defendants say that Robbins bought tobacco in a variety of names, but advised them that the purchases were all made for himself. He himself says that such was the case generally; indeed, in all cases except in the case of these seventeen hogsheads bought in the name of Miller. The defendants evidently supposed that the purchases were made for himself by Robbins. They had nothing to do with any one else; and we are satisfied that Robbins informed the defendants that the purchases were for himself, though entered at his instance in the name of Miller.

Sullivan and Dunham both testify that they had a contract with Robbins that the tobacco bought by him should

be held by them as security for the payment of the acceptances, and that they knew nothing of Miller. It is not claimed that Miller called on the defendants, or notified them personally of his interest, or had any intercourse with them. The acceptances became due and were renewed perhaps several times, and finally the defendants sold the tobacco and applied the proceeds to the payment of the acceptances, which was in accordance with the understanding they had with Robbins, the only party they had seen or known in the transaction.

This we think is a fair statement of the facts on which the defendants claim that they are entitled to the fund. The proceeds of the sales did not quite pay off the indebtedness to the defendants for purchases made by Robbins from them.

The facts on which the plaintiff claims the proceeds of this tobacco are, that at about the time when these purchases were made, Robbins, meeting the plaintiff, informed him that money could be made by purchasing tobacco, and the plaintiff having seven or eight thousand dollars to invest, it was agreed between them that plaintiff should advance the money to pay for tobacco, and that Robbins should make the purchases and also the sales, and that they should share the profits; that the tobacco should not be sold but by order of Miller, and should be subject to his control. No express arrangement was made as to losses, as they did not anticipate any. In fact, Miller never did assume any control of the tobacco, or say anything to defendants about it, till some time after it was sold. The moneys which Miller advanced to Robbins were not paid to defendants for the tobacco, although Miller supposed that such was the case. Robbins must have applied these moneys to the payment of his individual debts, while he bought these tobaccos on credit. Probably he paid the money, or most of it, to the defendants on former purchases, and thus was enabled to get a credit for the tobacco in

question, the plaintiff, Miller, supposing that the tobacco was bought in his name, and paid for in cash, and holding the receipted bill, with the blank tickets, for the tobacco which had been given him by Robbins at or about the time of receiving the money from the plaintiff.

It is evident that both these parties have been deceived by Robbins, and the question for us to determine is, which of them must suffer the loss? They have both trusted him. The plaintiff trusted him with his money and property. The defendants trusted him with the receipted bill and the unsigned tickets, though the property had not in fact been paid for, except by the acceptance of Robbins, to secure the payment of which they had an agreement with Robbins that they were to hold the tobacco.

We think the preponderance of evidence is in favor of the existence of the contract between Robbins and the defendants, that this, with other tobacco purchased by Robbins, should be held for the payment of the acceptances. We can not regard his qualified denial as entitled to great weight. He seems to have been false to both parties in a way to show that truthfulness was not one of his virtues.

As to his relation to the plaintiff, Robbins says that:

"The arrangement I had with Mr. Miller was this: Miller had money to invest. I told him cutting tobacco was a good investment. I was to share in the profits for my labor and services."

As to losses, he says they did not suppose there would be any, and did not talk about such a contingency.

Robbins managed the whole matter. He signed Miller's name, and used it very much as he pleased.

He says that after purchasing tobacco and getting the tickets and passing them to Miller, he in several instances bought the tobacco back, and took the tickets which had been made out for Miller to sign, and instead of having Miller sign his own name to the tickets when he called



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for the tobacco, he (Robbins) signed the name of Miller to the tickets, and received the tobacco from the defendants—a circumstance tending to confirm the statement made by him to them, that the purchases were all his own, and that the names of Miller and others, used by him, were merely nominal.

He says, also, that “the Miller money did not go to pay for the Miller tobacco, but to take up acceptances given forty-five days before September 6, 1868.”

Miller himself says: “I had some money in the fall of 1868, which I was using in various ways. I was acquainted with Robbins, and he told me to invest in cutting leaf tobacco. I asked him to buy some tobacco, and we would sell again and divide the profits.”

On cross-examination he says: “The profits were to be shared equally. Mr. Robbins was to manufacture the tobacco in his factory, if it would sell at a loss, so that I was not to lose anything. Mr. Robbins was to sell by my advice; that was my understanding. There was to be no tobacco sold without my consent.”

He says that he got a mortgage on Robbins' factory and some other property as security, which did not, however, turn out to add much to his security. He says: “I looked to John I. Robbins to carry out his agreement, and pay me all the money he had from me. I asked him for money, and he said he had none—said it was not a good time to sell. I supposed Robbins was an honest man. I never went near the defendants' warehouse. These collaterals (the mortgage and certain insurance company stock) are held by me for the tobacco sued on, as well as the \$4,000, in case I lose this suit. I looked to both Robbins and these defendants. We were to divide profits. We said nothing about losses; we did not expect to make any. *If we had, I suppose we should have shared them.*

*“If tobacco declined in the market, he (Robbins) could take*

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*the tobacco and work it up, so that there should be no loss to me."*

On re-examination, he says :

"I treated the tobacco as so much money. I looked to these securities for all the indebtedness of Robbins to me, including the tobacco sued on. I considered these tobaccos as so much cash in hand."

From the testimony of the defendants' clerk, Queen, it appears that Robbins bought in various names, sometimes in the name of the clerk himself, but that the purchases were all made by Robbins, and, as he represented, for himself, and were so regarded and treated by the defendants.

The first question to be determined on the evidence is, what was the relation between Robbins and Miller?

It has been held, in the case of *Boker v. Hatch*, in this court, that it does not necessarily result that a man is a partner because he receives a portion of the net profits as compensation for his services. Nevertheless, in the present case, where the plaintiff was to furnish the money and Robbins to do the business and share equally the profits, and under circumstances which imply that if there had been losses they were to share in the losses also, it seems to a majority of the court that Robbins must be regarded either as a partner, or else an agent with power to pledge this property to pay the acceptances given to pay the purchase money of the tobacco, and that the defendants were justified in law in selling the tobacco to pay the debt to them, under the circumstances disclosed in the evidence.

If Robbins was a partner, and purchased the tobacco for the firm, as we think he was, and took a receipted bill, without actually paying for it, the receipt could be explained and the payment enforced as against the partnership. All the evidence on this question comes from the plaintiff himself and from Robbins. It is not to be presumed that the plaintiff gave any more than the full

strength of the circumstances against him on this point. The defendants never had the slightest notice or knowledge of the plaintiff having any interest in the property, except the use of his name by Robbins. They had the property, as they supposed, under an authority to hold it for their security.

The strong point against them is, that their clerk allowed this man Robbins to have a receipted bill, which he presented to Miller. But a receipted bill is not a negotiable paper, and it may be explained. If the purchase was made for plaintiff as a partner with Robbins, neither of them can escape the obligation to pay for it.

Taking into consideration all the circumstances of this case, a majority of the court are of the opinion that Miller was identified with Robbins as a partner in the whole transaction, bound to share the losses as well as the profits, and bound by the contracts of Robbins in carrying on the partnership business, and that, although the money which Miller had intrusted to Robbins to invest had been misapplied by him, the defendants are not responsible for his breach of trust; and being themselves guilty of no fraud, they are entitled to the benefit of their contract with Robbins, and to hold the tobacco as security for the purchase money.

The judgment will be reversed.

HAGANS, J., dissented. It is said Robbins and Miller were either partners—not as to third persons, for no question of that kind arises in the case—but partners *inter sese*, or else Robbins was the agent of Miller, and that, in either view of the case, the defendants are not liable. This case stands upon error, and the findings below by the judge, at Special Term, are entitled to all the consideration of the verdict of a jury, and should not be interfered with unless palpably wrong. Uncertainty is not enough when we come to review the evidence, and any mere doubt ought to be resolved in favor of the judgment. Whether or not

there is a partnership *inter sese* in a given case depends upon the intention of the parties, to be gathered from all the evidence and circumstances surrounding the case. Let us look into the testimony. Robbins was largely engaged in the manufacture of tobacco; Miller had some money and great faith in Robbins, but no experience. He was therefore easily persuaded to venture into speculative leaf tobacco purchases for cash, and the parties enter into an arrangement by which Robbins was to buy the tobacco for Miller, and Robbins was to have one-half the profits for his labor. There was no stipulation as to the losses; they did not expect any losses in manufacturing the tobacco. No agreement or understanding, however, was had between Robbins and Miller as to the losses, should they occur, even by inference; on the contrary, Miller positively states thrice that he was to lose nothing, though he states that if there had been any losses they would have shared them he supposed. This would have been a matter of gratuity, not of obligation. His language is, "Robbins was to manufacture the tobacco in his factory if it would sell at a loss, so that I was not to lose anything; and if tobacco declined he (Robbins) could take it and work it up, so that there should be no loss to me." Any other testimony on this point discloses no different agreement between the parties. Both Miller and Robbins agree that Miller was to control the tobacco, and it was to be sold only on his order or with his consent. Accordingly, on the strength of this arrangement Miller gave Robbins some money—how much does not clearly appear. Miller's whole investment was over \$6,000, and the fair inference is that but a small portion was given to Robbins before any purchases were made. However, this makes no substantial difference. In pursuance of the agreement between the parties, Robbins attended the sales at the defendants' warehouse and bought the tobacco in controversy for Miller, as he says. Miller says, "I asked Robbins to buy for me." Robbins had the tobacco put on defendants' books in Miller's name as the

purchaser. As he was buying largely, with the improper intent of concealing from the government the extent of his transactions, he had the tobacco put not only in his own name, but in the name of defendants' clerk, who entered the sales, and others. Delivery checks were issued in the names of the purchasers and delivered to Robbins, upon which, when returned to the warehouse signed by the person in whose name they were issued, the tobacco would be delivered if the tobacco was paid for. Although this business was uniformly a cash business, these defendants were dealing with Robbins on credit, under an agreement that the tobacco he bought was to be held in pledge until paid for. Defendants were in utter ignorance of Robbins' arrangement with Miller, as Miller was of Robbins' arrangement with defendants.

The defendants supposed all these purchases were by Robbins for himself, and so they aided him in carrying out his improper intent by making these sales entries as they did. They took Robbins' acceptances at sixty days for all the tobacco, of which fact he did not advise Miller; and they also issued delivery tickets in Miller's name and gave them to Robbins, together with invoices, in Miller's name, of the tobacco in controversy, signed, "Received payment, J. T. Sullivan & Co." It does not appear that any such receipted invoices were given by the defendants for any other lots of tobacco bought by Robbins at that time. When he got the tickets and the receipted invoices he took them to Miller, showed them to him, and Miller then paid him for them in cash, and he delivered to Miller both tickets and invoices, explaining to him that the tobacco could as well remain with defendants, on storage, as he had no room for it in the factory. Robbins says, in one place, he sold these tickets and invoices to Miller, and he paid him for them; but in another place he describes the transaction as stated.

It appears that Robbins bought other small lots of tobacco for Miller in the same way, Miller having both

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tickets and receipts of payment, and that Miller resold to Robbins, delivering to him the tickets, and he obtained the tobacco on them, signing Miller's name thereto, with his assent. On these occasions Miller says he charged the tobacco up to Robbins, when he gave him these tickets, under the belief that all was right. Miller, who lived in Cincinnati, never went near the defendants' warehouse in Covington for six months. He might well rest easy under the circumstances. But when he did go for his tobacco, he found the defendants had sold it to pay for Robbins' debt, who had in the meantime become insolvent, and the defendants refused to recognize his rights at all. Now, it is said that Robbins does not appear well in those transactions, and therefore his statements are not entitled to much weight. But admitting this, Miller's credibility is confessedly above suspicion; and wherever he confirms Robbins, which is mostly the case throughout the testimony, and especially so in every important particular, I think Robbins ought to be entitled to belief in such statements as are corroborated at least.

There is plainly, to my mind, no partnership between Robbins and Miller at all. The preponderance of the evidence is clearly this way. The defendants must be held to have been advised that this purchase for Miller was a *bona fide* one, for they gave a receipted bill, made out in Miller's name, for it, and chose deliberately to look to Robbins for their pay. They are estopped from now claiming that Miller must bear this loss. A reference to the text-books on this subject shows that several vital elements of a partnership are wanting. There was no community in the disposition of the tobacco; Miller alone was to dispose of it. Robbins had no interest in the property, but only in the profits, and he had no right to demand or receive any more.

This share of the profits was merely his measure of compensation. If, on the whole transaction, there had been a loss, Miller would have been obliged, as the testimony

stands, to bear it. He could not call on Robbins to bear any proportion of it, for, as between them, Robbins was only interested in the profit. There does not seem anywhere any intention on the part of either of them that they should be partners *inter sese*. This must appear from their acts and the circumstances before they can be held as such. See Parsons on Partnership (ed. of 1867), 47-50, and the cases cited there. In applying these principles to the facts of this case, there is no room for doubt in my mind on this question.

If any relation, then, existed at all between Robbins and Miller, it was that of principal and agent. I shall not stop to discuss any question as to the extent of Robbins' authority to bind his undisclosed principal, Miller, in the dealings with the defendants.

Judge Story, in his work on Agency, section 433, says: "If a creditor of the principal settles with the agent, and takes a note or other security from the latter for the amount due by the principal, although as between the parties it is intended only as conditional payment, yet if the creditor gave a receipt as if the money were actually received, or the security were an absolute payment, so that the agent is thereby enabled to settle, and does settle with the principal, as if the debt had been actually discharged, and the principal would otherwise be prejudiced, the debt will be deemed, as to the latter, absolutely discharged."

And this upon the plainest principles of equity. "Admissions *in pais*, though made in good faith, may yet be made under such circumstances as to operate by way of estoppel, and preclude the party from afterward gainsaying them." *Beardsly v. Foote*, 14 Ohio St. 414.

This case is clearly within these principles, and they are decisive of it. Miller was not an undisclosed principal. The tobacco was knocked down to him, so entered on defendants' books, and both the tickets and invoices were made out in his name, and the defendants are therefore

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bound at their peril to know that Miller was a principal and Robbins his agent, and they can not hide themselves behind an excuse that they supposed Robbins was dealing for himself, which they themselves helped to originate. *Brown v. Telegraph Co.*, 80 Ind. 39.

It is said that if Robbins and Miller were partners, the receipted invoices would be open to explanation, and they could not escape the obligation to pay for the tobacco. This conclusion may be granted if the premise is admitted, but not otherwise. It is true that if they were partners the receipt might be explained. If they were not partners, as between Robbins and the defendants, it might be explained. The defendants have acted on that idea, for they have sold this tobacco to pay for it, notwithstanding the receipted invoices. But when these receipts and tickets are passed to Miller, who, upon the faith of them, and trusting to them, has undoubtedly suffered harm, I do not think the receipts are open to explanation afterward on the part of the defendants.

Again, it is said that the transfer to Miller of the receipted invoices and the tickets did not transfer the property in the tobacco to him. This may be admitted. But how does this affect the case as presented? Here were two innocent parties, though as to the defendants this can hardly be said. The defendants put it in Robbins' power to deceive and wrong Miller, and of the two innocent parties they must suffer, not Miller. As this case presents itself to me, it is a very strong case for the application of this principle.

I think the judgment, therefore, ought to be affirmed.



LILLIE B. REDDISH ET AL., per Guardian, v. JOHN W. CARTER.

J., before the wills act of 1840, devises lands to S., "to have and to hold during his natural life, and to his heirs, and in case of the decease of S. before maturity and without legal issue," then remainder over.

*Held*, that by "heirs," the testator meant "children;" that the intention should overcome an arbitrary rule of law, and that, disregarding the rule in Shelley's case, S. took but a life estate.

A court, in order to carry out the clear intention of a testator, must frequently regard the words "heirs," "children," and "issue," as convertible.

**GENERAL TERM.**—This case is reserved from Special Term upon demurrer to the petition, which discloses the following facts:

The plaintiffs are the children of Stevenson Reddish and the grandchildren of Thomas Reddish, both of whom are now deceased.

The defendant derives his title from the grantee of Stevenson Reddish, and claims to hold the fee of certain real estate.

On the 17th day of March, 1831, Thomas Reddish, by his will, devised to his son "Stevenson a lot in Cincinnati, situated on the north side of Longworth street, to have and to hold the same during his natural life, and to his heirs, and in case of the decease of said Stevenson before his maturity according to law, and without lawful issue, then the same lot, as well as all the real or personal estate whatever, which may be coming to him through the said testator's will, to be left to the surviving children of my sister Elizabeth Bently, and my brother John Reddish, both of the town of Manchester, England, equally to share them." Other real estate was devised to Stevenson Reddish and his sister Sarah Reddish, to hold in the same manner, and by a similar clause. The personal estate of

the testator was also given to the same parties, to be held in the same manner as was prescribed by the testator of his realty.

*Edward Colston and Jordan, Jordan & Williams*, in support of the demurrer:

1. The words "during his natural life and to his heirs," taken alone, will convey a fee by force of the rule in Shelley's case. 1 *Fearne on Remainders*, [149,] [198]; 1 *Preston on Estates*, [268]; *McFeely's Lessee v. Moore's Heirs*, 5 Ohio, 465; *Armstrong v. Zane's Heirs*, 12 Ib. 287; *King's Adm'r v. King's Heirs*, Ib. 390.

2. The ulterior devise, in default of issue to first devisee, does not impair the legal effect of the word "heirs" in the prior devise, as they do not at all refer to the quantity of the estate, but merely to its disposition on the happening of a contingency, which has not yet occurred nor can now ever occur. 4 *Kent's Com.* 214, and cases cited *supra*.

3. The testator must be considered as having used the word "heirs" in its legal import, unless it appear so clearly that no one can misunderstand that his intention was to give it some other meaning. 1 *Fearne on Remainders*, [168,] and cases cited; 2 *Jarman on Wills*, [277] *et seq.*; *Ide v. Ide*, 5 Mass. 500; *Mowat v. Carew*, 7 Paige Ch. 328; *Poole v. Poole*, 3 B. & P. 620; *Jesson v. Wright*, 2 Bligh, 56, decided by Lord Eldon and Lord Redesdale.

All admit that technical words are not necessary in a will; but where a testator sees fit to use such words, we are bound to understand that he used them in their appropriate sense, unless he himself has satisfied us that he has not done so. The principal American cases are: *Ellis v. Essex Bridge*, 2 Pick. 243; *Bowers v. Porter*, 4 Pick. 198; *Stevenson v. Evans*, 10 Ohio St. 307; *Collier v. Collier*, 3 Ohio St. 369; *Niles v. Gray*, 12 Ohio St. 320.

4. The circumstances of the devise to Stevenson being for his life does not show the intention of the testator so

clearly as to prevent the rule in Shelley's case from applying. *Roe v. Bedford*, 4 Maule & Sel.; *Robinson v. Robinson*, 2 Vesey, Sen., 225; *Doe v. Cooper*, 1 East, 229; *Perrin v. Blake*, 4 Burr, 2579; *McFeely's Lessee v. Moore's Heirs*, 5 Ohio, 465.

*Matthews & Ramsey* and *Thos. T. Heath*, contra:

1. That the devise to Stevenson Reddish expressly limits to him an estate for life only, and that such appears to have been the intention of the testator, which the court will effectuate without reference to any arbitrary rule of construction. *King v. Beck*, 15 Ohio, 559. This position does not exclude the authority, but merely the application of *Smith v. Berry*, 8 Ohio, 365; *Thompson v. Hoop*, 6 Ohio St. 480.

2. That the use of the words "decease before maturity without lawful issue" shows that the word "heirs" was used with the meaning and sense of "issue," and meant children or descendants, and that they therefore will be construed words of purchase and not of limitation. *Stevenson v. Evans*, 10 Ohio St. 307; *Ellicombe v. Gompertz*, 8 Mylne & Cr. 127-154; *Abbott v. Essex Co.*, 18 How. 202.

3. *Niles v. Gray*, 12 Ohio St. 320, is clearly to be distinguished, as in that case it was the clear intention to give a fee simple in the first devisee, while in the one at bar the intention is equally clear to give but a life estate. The former simply decides that the words "dying without issue" mean issue living at the death of the devisee, and can not therefore have the force they would if construed to mean without issue indefinitely. See *Hull v. Priest*, 6 Gray, 18.

STORER, J. A single question is presented for our determination: What estate did Stevenson Reddish take under the devise from his father? Was it a term for his life only, a fee simple, or a fee tail?

The defendant claims to hold an estate in fee, while the

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plaintiffs allege their father, when he made the conveyance, held an estate for life only.

Where the intention of a testator can be ascertained, we need not resort to any artificial rule to limit or extend a devise.

If the purpose of the testator can be determined without violence to the language he has used, and there is no ambiguity in the terms employed, it is our duty so to interpret the whole instrument that we shall give effect to what we are satisfied was the object of the testator in disposing of his property.

The will before us was probated in December, 1831, when the rule relied upon by the plaintiff was admitted to be the law in Ohio. *McFeely's Heirs v. Moore*, 5 Ohio, 469. But by the wills act of 1840, sec. 47, 1 Curwen, 69, it was provided, "When lands, tenements, or hereditaments are given by will to any person for life, and after his decease to his heirs in fee, or by words to that effect, the conveyance shall be construed to vest an estate for life only to such first taken, and a remainder in fee simple to his heirs." This section was re-enacted in May, 1852. 3 Curwen, 1911.

From the fact that our legislature, so soon after the decision in *Moore v. McFeely* was rendered, declared that the rule in Shelley's case should no longer be followed in construing devises, and the general unwillingness of the profession to adopt it, regarding it as a technical and arbitrary exposition of the law, we ought not to apply it in any case, even if the statute had not been passed, unless we were required to do so to uphold a devise that would otherwise fail. Whatever estate was devised by the testator to his son became vested before the statute of 1840; but we do not feel bound to regard it with any more favor than we should if the decision in *McFeely and Moore* was still obligatory. In *King's Heirs v. King's Adm'rs*, 12 Ohio, 890, following their former opinion in *McFeely v. Moore*, the Supreme Court held that the rule in Shelley's case, although not then applicable

to wills taking effect since 1840, was in all other respects a rule of property in Ohio; but this opinion was afterward reversed in *King v. Beck*, 15 Ohio, 559, where it was held that the rule referred to would not be allowed to prevail against the intention of the testator, if that intention could be effectuated without creating an estate forbidden by law.

The effect of this decision, we suppose, was in all cases where the limitation in the will was to the first taker for life by express words, to deny the application of the rule referred to, regarding the section 47 of the wills act as declaratory of the law previously existing, not as establishing a new rule, but removing all doubt as to what the law really was. We may therefore conclude, that in every case where there is a clear expression of the testator's purpose by the language of the devise, that the devise should hold for life only, that intention should be adhered to, without resorting to a mode of proceeding purely arbitrary to explain it.

The learned judge who decided the case of *McFeely v. Moore*, seemed to regard the rule with more veneration for its antiquity and the learning with which it had been discussed in England, without any particular reason for its applicability to our institutions, and it has since met with no particular favor with the profession in Ohio. The rule itself has been abolished by statute in New York, Maine, Massachusetts, Connecticut, and Illinois, and in Mississippi, New Hampshire, and New Jersey, it is applicable only to grants, and we think it should not be applied in this State to wills probated before 1840, except in extreme cases, where no other course can be followed.

We need not refer to the bitter opposition the rule encountered in its early history, until after the conflict of nearly two centuries it was finally confirmed in *Perrin v. Blake*. Sufficient is it for us to feel that it would never have originated in the United States, where no such condition of things existed which had induced the English courts to introduce it into the body of the common law before the revolution.

If we refer to the devise of the testator to his son, it vests

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the devisee by explicit language with an estate for life and to his heirs, and in case of the decease of the devisee before he arrives at his majority, and without lawful issue, there should be a remainder over to the children of the testator's sister and brother.

It is argued that the word "heirs" following the estate for life, there being no word preceding it designating the class of heirs, must be taken to mean heirs generally; but we think when taken in connection with the subsequent part of the devise, which gives the estate for life where the children of the devisee are named, as restricting the term "heirs" to the issue of the devisee, thus creating an estate tail, and vesting a fee simple in the children of the devisee as first donees in tail under the statute. It is admitted that the devisee, the testator's son, not only arrived at full age, but the plaintiffs are his children, who take, we are satisfied, no estate from their father by descent, but are vested with an estate by purchase, by virtue of their grandfather's will.

The words "heir, heirs, children, and issue," are frequently regarded as convertible, and may be construed, taking into consideration the whole will, to mean either one or the other, as its proper construction may require; thus, a devise to heirs may be interpreted to mean children or issue, and either restricted or enlarged, as may be necessary to carry out the purpose of the testator. *Cosby et al v. Lee's Ex'rs*, 2 Disney, 460; *King v. Beck*, 15 Ohio, 559; and the well-considered case of *Bowers v. Porter*, 4 Pick. 209, where Chief Justice Parker reviews the whole law on the subject.

Judge Redfield very aptly says, in his late work on Wills, vol. 2, p. 204, that the rule in Shelley's case has more commonly "led one side of the real intention of the devisor than almost any other;" and of a similar opinion was our Supreme Court, when they decided the case of *King v. Beck*, 15 Ohio, 559, on a will probated before 1840, where they held, to use the language of Judge Read, who gave the opinion, "that they had no disposition to strain a point to

bring a case within the operation of the rule in Shelley's case, a rule, he said, which had its origin in feudal tenure, and was first adopted to secure to the lord the profits and perquisites incident to inheritances, and as an afterthought, the additional reason that it was necessary to prevent an abeyance of the fee. It is at least an artificial technicality, and just in proportion as it lacks reason, it has won upon the affections of the profession; but it is the duty of this court to conform its decisions, when we attempt to walk by the light of precedent from another country, to the nature of our institutions."

While we admire the touching lamentation of Chancellor Kent, upon the abolition of the rule in New York, we have no disposition with him to mourn over its fate. 4 Kent's Com. 267, note.

On a careful consideration of all the questions made by counsel, we are all of opinion that the testator intended to devise a life estate only to his son in the property described in the petition, with remainder over to his grandchildren, whether in fee or in tail it is immaterial for the purposes of this action, as in either case the plaintiff must recover.

We have been favored, both by oral and written argument, with a very able discussion of the law of devises, more especially on the proper application of the rule in Shelley's case to the devise of the testator to his son; but while we have been impressed with the thorough research of counsel into the ancient law, as expounded by Fearne and Perkins, and the more modern adjudications of the courts, while we admit they have so well vindicated the maxim "*sa'ius est petere fontes, quam sectari rivulos*," we are, nevertheless, fully persuaded the rule we have discussed is not one of construction to which we are bound implicitly to adhere.

On the whole case, judgment will be rendered for the plaintiffs.

JOHN MURRAY and SUSAN MURRAY, his wife, v. WILLIAM MURRAY and MARY MURRAY, his wife.

A. says of B., a married woman, "She is not a decent woman; she had a bastard child by her husband before her marriage," etc.

Held, on demurrer, that the words were actionable *per se*, and no special damage need be averred.

ERROR TO SPECIAL TERM.—The petition and demurrer thereto, which was sustained at Special Term, present the case as brought up on writ of error to the judgment below.

The plaintiffs complained that the defendant, Mary Murray, wife of William Murray, on the 31st of October, 1870, charged the plaintiff's wife, Susan Murray, in the following words, "She," meaning the said Susan Murray, "had a bastard child by her husband before marriage;" that "she," meaning the said Susan, "ran after him," meaning the said John Murray, "in all the dirty alleys in town, and compelled him to marry her by bringing him into court."

The defendants demurred, and after argument the court below sustained the demurrer.

*Edwards*, for plaintiff.

*Mallon & Coffey*, contra.

STORER, J. In giving a construction to the language used by others, we must ascertain the intention of the party who has spoken the words charged as slanderous, and are permitted to take every part of the conversation wherein the accusation was made into account.

The parties litigant are females of the same name, and, it may be, related to one another; and we may conclude, if



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the words are truly stated, the defendant must have intended to injure and defame the plaintiff.

The demurrer admits the fact that the defendant begins with the assertion the plaintiff "is not a decent woman," an epithet which, in common parlance, will scarcely admit of any other meaning than that "she is not morally pure;" indeed, such is the implication that would naturally be drawn from such a charge. But connected with the charge is that of having had an illegitimate child, which explains what the defendant intended by using the introductory words thus. We think the words spoken convey clearly the imputation of such immoral conduct as may well authorize the recovery of damages by the plaintiff.

Where, by the common law, an action would not lie in favor of a female for similar words spoken to her prejudice, our courts have, nevertheless, protected the party aggrieved. Thus it was held more than half a century ago, that to call a woman a strumpet was actionable *per se*, without any allegation of special damage. This is now the admitted rule in Ohio. *Sexton v. Todd*, Wright's Reports, 817.

In *Watson v. Trask*, 6 Ohio, 582, it is said, "That any charge which, if true, tends to exclude a person from society, the party aggrieved may seek redress from the jury without alleging or proving special damages." And if, in ordinary cases, such has been regarded as the proper test, *ex fortiori* where the character of a female is impugned by a statement which must necessarily result in social excommunication.

So in *Malone v. Stewart*, 15 Ohio, 319, the principle is fully sustained. The court there say, "That words spoken of a female which tend to wound her feelings, bring her into contempt, and prevent her from occupying such a position in society as is her right as a woman, are actionable in themselves."

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In *Reynolds v. Tucker and wife*, 6 Ohio St. 516, the action being for words spoken of the plaintiff's wife very similar in substance to those charged in the case at bar, the rule we have referred to was again recognized without any modification.

It was said by Scott, J., in giving the opinion of the court in *Alfele v. Wright*, 17 Ohio St. 238, that "the only innovation upon the common law rule in cases of slander, which has been made in Ohio, is in regard to the slander of a female; words charging her with a want of chastity are now actionable in themselves, though this exception has never been extended to the other sex."

We feel bound by the hitherto undoubted rule which has so long prevailed in this State, and is sanctioned by so many judicial decisions. We are of opinion the demurrer should have been overruled, and an entry to that effect is now ordered.

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R. B. DOUGHERTY v. SCHLOTMAN, SHILLITO & Co., ET AL.

On the 11th of January, 1867, G. transferred his stock of dry goods to D.

On the 12th of January, 1867, S. & Co., creditors of G., attached the goods as his property, upon a claim of \$2,000, on the ground that G. had disposed of his property with intent to hinder, delay, and defraud his creditors. D. took the goods in replevin, giving his replevin bond, with sureties, in the sum of \$10,000.

On the 20th of May, 1869, while the cause was pending, S. & Co. filed a cross-petition setting forth the insolvency of G. at the time of the transfer to D., and giving the names of creditors and the amounts of their claims, in the aggregate \$18,000, while the entire assets of G. were only \$8,000, and alleging that the transfer was made to hinder, delay, and defraud his creditors, and asking, under section 17 of the assignment act, that the transfer be declared void, and that the assets might be administered by an assignee for the benefit of the creditors. Motion to strike out the cross-petition having been overruled, and the jury having

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returned a verdict for the defendants against the validity of the transfer, and found the value of the property to be \$7,500, which, by decree, was distributed among the creditors:

*Held*, that the court did not err in overruling the motion to strike out the cross-petition; that the bond took the place of the property, and that the recovery on the cross-petition was not limited to the amount of the claim of the attaching creditors, but covered the entire value of the property replevied, as found by the jury.

On the 12th day of January, 1867, John Shillito & Co. commenced a suit against G. & J. Gibson, on a claim of \$1,728.40, and procured an attachment, on the ground that they had disposed of their property, a stock of dry goods, with the intent to defraud their creditors, and caused it to be levied upon as the property of the defendants.

On the 14th of the same month, Louis Stix & Co. commenced suit against the Gibsons for \$1,980.50, and caused an attachment to be issued on the same ground.

On the same day, viz: January 14th, the plaintiff, Robert B. Dougherty, commenced a suit in replevin against the sheriff, and took the attached goods, claiming them by virtue of a purchase made on the 11th of January from the Gibsons, and giving a replevin bond in \$10,000, with sureties. The validity of the sale and transfer on the 11th of January, 1867, by the Gibsons to the plaintiff, Dougherty, became the subject of inquiry and decision by the jury. The verdict was against the sale.

Prior to the trial in the replevin case, on the 20th of May, 1869, the defendants in replevin filed a cross-petition, in which they set forth that on the 11th of January, 1867, the time when the transfer of the stock of goods was made by the Gibsons to the plaintiff, they owed sundry debts to sundry creditors, naming them and describing the claims, amounting to \$18,319.35, while their property, consisting of a stock of dry goods, amounted in value to but \$8,000, which was all their property, and alleging that said transfer was made with the intent to hinder, delay, and defraud defendants and others, who were creditors of the Gibsons, in the col-

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lection of their claims, and they asked that the transfer might be declared by the court to have been made with the intent to hinder, delay, and defraud said defendants and others, who were creditors of the Gibsons, and to be void; that said defendants might be appointed assignees and trustees to take possession of said stock, or that the same might be administered as in case of assignments to trustees for the benefit of creditors.

A motion was made to strike this cross-petition from the files, which motion was overruled, and it was claimed that the court erred.

*Okey, and Lincoln, Smith, Warnock & Stevens, for plaintiff.*

*J. & R. A. Johnston, and Matthews & Ramsey, for defendants.*

Taft, J. An important point made is upon the overruling the motion to strike out the cross-petition of the defendants. It turns upon the application of section 17 of the assignment act as amended in 1863, S. & S. 397, which provides, "That all transfers made with intent to hinder, delay, or defraud creditors shall be declared void at the suit of any creditor," and that after such transfer shall have been declared to have been made with such intent, the probate court shall appoint an assignee, who shall proceed to administer the property for the benefit of the creditors, requiring a publication of a four weeks' notice of the pendency of the suit, and allowing to the creditors fifteen days after the expiration of the notice for filing their answers, in order to entitle themselves to a *pro rata* distribution, to the exclusion of those creditors who do not present their claims by answer within the fifteen days after the expiration of the notice. The cross-petition is founded on this act. By the replevin suit the plaintiff in replevin, we think, acquired the property and possession of the goods so far as the parties to

the suit were concerned, and he gave his replevin bond, with sureties, to take the place of the *property itself*. If he should fail to sustain his right to the property, he would be responsible to the attaching creditors for the amount of their debts, and to the debtor or original owner of the property for the balance after paying the attaching creditors, unless he had acquired against the original owner a title to such balance by a valid sale.

But if there had been mortgagees of the property subsequent to the attaching creditors, but prior in right to the plaintiff, by his action of replevin he would have been bound to pay over the surplus to them, to the extent of their mortgages, if they asserted their claim by cross-petition. *Armstrong v. McAlpin*, 18 Ohio St. 184, and *Morgan v. Spangler*, recently decided by the Supreme Court, and to be reported in 20 Ohio St. Now the cross-petition, in the present case, goes upon the theory that the transfer of January 11, 1867, was such that it inured, under the statute, to the benefit of all equally who should come in by suit and claim it, and that the creditors' right related to the date of the fraudulent transfer, and that this right of the creditors was, therefore, prior to and better than that of the plaintiff by his replevin. By filing the cross-petition the defendants waived the preference sought by their attachments in favor of the creditors who should come in under their cross-petition and claim the benefit of the statute, and as plaintiffs in the cross-petition they were left with no other benefit from the transfer to Dougherty than that of a *pro rata* distribution with the other creditors who should come in. They were, however, enabled to bring forward by their cross-petition other claims of their own not included in the attachment. The jury have found that the transfer to the plaintiff in replevin was made with intent to hinder, delay, or defraud creditors, and so falls within section 17 of the assignment law to which we have referred. We think that by our statute the bond takes the place of the property so far as the original owner and the parties to the replevin suit are

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concerned. The undertaking is to be in double the value of the property taken, and "to the effect that the plaintiff shall duly prosecute the action and pay all costs and damages which may be awarded against him." In *Jennings v. Johnson*, 17 Ohio, 155, it was held "that the replevin bond took the place of the property to the extent of the interest of the defendant in replevin." The interest of the defendants in replevin in the present case would, in the first instance, be the amount of the attachments.

But in *Conrad v. Pancost*, 11 Ohio St. 685, it was held that section 17 of the act of April 6, 1859, 1 S. & C. 713, in relation to assignments by insolvent debtors, in no respect qualified section 191 of the Code, but operated merely upon the title of the property already so assigned or conveyed affixing to it the same title under the circumstances as if expressed in a written assignment by the debtors," and it was competent for the court to direct execution of the trust. The right of creditors depended upon the transfer made by the debtor, and took effect from the execution of the transfer, though the proceedings to enforce their right were commenced long afterward.

Section 17, under which the case of *Conrad v. Pancost* was decided, provided that "all transfers made with intent to hinder, delay, or defraud creditors, shall inure to the equal benefit of all creditors," "and the probate judge, after such transfer shall have been declared by a court of competent jurisdiction to have been made with the intent aforesaid, at the application of any creditor, shall appoint an assignee" to administer the trust.

If that act had remained in force, the case of *Conrad v. Pancost*, 11 Ohio St. 686, would be an authority to hold the property upon the finding of this jury to inure to the benefit of all the creditors equally, and upon the declaration of that fact by a competent court, the probate court would have proceeded to administer the trust.

This section 17, as amended by the act of 1863, provided that all such transfers shall be declared void at the

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suit of any creditor, and the probate judge, after the said intent has been found by a competent court, shall proceed to appoint an assignee to administer the fund for the benefit of the creditors as in other cases of assignments to trustees, provided four weeks' notice shall be published by the plaintiff of the pendency of the action, and that all creditors who shall come in by answer with their claims, within fifteen days after the expiration of the publication, shall be entitled to have distribution to the exclusion of all who do not so come in, and those who do not so come in may have equal distribution of what remains after paying in full those who have come in in time.

We think the amended section gives to the fraudulent transfer the effect of an assignment for the benefit of the creditors as effectually as it did before the amendment, and the proceedings under it relate to the time when it was made.

It is claimed that this last act is different from the former, in that it makes void such transfer only *at the suit of a creditor*; and that here is not a suit of any creditor to make it void.

We regard the filing of a cross-petition by a creditor setting up his claim and asking that the transfer be declared void, as the commencement of a suit within the meaning of the statute. The defendants have, however, failed to comply with the requirement that four weeks' notice shall be published, in order that creditors might come in with their claims by answer. Nevertheless, we think that the notice may yet be published, and after the four weeks shall have elapsed and fifteen days more, the distribution may be made among the creditors who shall have come in as the statute requires. But the cross-petition was not liable to be stricken out, and the trial having established the right of property, and the amount of the damages, has given the court a basis on which to proceed in the administration of this fund. As no creditor has applied to the probate court for the appointment of an assignee, this court may, under

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the authority of *Conrad v. Pancost*, proceed to administer the fund. As to the manner of administering the fund, or the steps to be taken, it is not necessary that we should be more specific. It is enough that we now declare that the cross-petition was properly filed, and that the motion to strike it out was properly overruled.

We come, then, to the errors assigned at the trial.

It is claimed that the court should have instructed the jury that they could not find for the defendants unless the evidence satisfied them beyond a reasonable doubt that the transfer was made with intent to hinder, delay, or defraud creditors, because it would be finding the plaintiff guilty of a crime. We think it would have been erroneous to give the charge asked, because we do not think that the hindering, or delaying, or defrauding of creditors, which would be sufficient to justify a court in declaring a transfer void under section 17, would necessarily amount to the "*cheating and defrauding*," or to "the *fraudulent* transfer to defeat his creditors," which constitutes the misdemeanor under section 12 of the act for the punishment of certain offenses therein named, passed March 8, 1831. It is impossible for us to decide that the one is the same, with the other, and a verdict in this case would not be evidence that the offense defined in said section 12 had been committed. We think the ruling of the court was right.

Objection is urged that the appraisal made for the purpose of the replevin bond, was ruled out when offered by the plaintiff. There was other and better evidence, and while we might not have been willing to reverse the judgment, if the evidence had been received, we do not think the plaintiff was prejudiced by its exclusion.

An objection is also urged against the verdict, because the court permitted the amount of the insurance procured and kept on the stock by the plaintiff, to be given in evidence. This seems to have been an act on the part of the plaintiff in the nature of an admission, and, as such, it appears to us to have been competent.



It is also claimed that parol evidence was permitted to prove the amount of the insurance, when the policy was the best evidence. But the policy was in the hands of the plaintiff, and notice was given him to produce it, which he did not do. Plaintiff's counsel complain that the policy was in Louisville, and the notice was too short for the plaintiff to get it before the testimony was allowed to be given. But the testimony related merely to the amount insured, and the policy was in the hands of the plaintiff, and it does not appear that the testimony was not correct, which could have been made to appear on motion for a new trial, if such had been the case, by the production of the policies. It is quite clear to us that the plaintiff has not been prejudiced by this testimony being admitted instead of the policy. Besides, we regard the notice under the circumstances as sufficient to warrant the admission of secondary evidence.

As to conversations preceding the issuing of the policy, they were competent, not to prove a contract of insurance, but to prove admissions of the plaintiff as to the value of the property. And the same principle applies to declarations made by the Gibsons in presence of the plaintiff, and not denied.

As to the judgment on the verdict, however, we think it should be modified so as to make it accord with the views we have expressed, in order that it may be administered under section 17 of the assignment act, as amended in 1863.

THE CINCINNATI CHRONICLE COMPANY, Plaintiff, v. THE  
WHITE LINE CENTRAL TRANSIT COMPANY, Defendant.

Where the plaintiff was about to commence the publishing of a newspaper in Cincinnati, and was waiting for the machinery to arrive from New York, where it had been purchased, and the carriers had been notified of these facts when they contracted to carry the machinery to Cincinnati in four days, and a part of the machinery was lost:

*Held*, that the carrier was liable for the direct and necessary consequences, including wages of men, who were idle for want of the machinery after the time when it was to have been delivered, and the cost of efforts made to recover the machinery, as well as the cost of replacing that which was lost, and which could only be replaced by ordering it from the manufactory in New York.

The original complaint in this case was that the defendant, the White Line Central Transit Company, having received and undertaken to transport for the plaintiff below forty-one boxes and packages, containing the machinery composing the printing press of the plaintiff, failed to deliver one box of the machinery for so long a time that the plaintiff was compelled to procure other machinery, and suffered damage by delay in consequence of keeping a large force of operatives unemployed during the time of the delay. The answer denies the failure to deliver the one box.

The case was submitted to the court at Special Term, and the judge found for the plaintiff \$767.93 as damages, and a motion for new trial was overruled.

*Stallo & Kittredge*, for plaintiff.

*Wright & Throop*, for defendant.

TAFT, J. It is claimed that the judge proceeded on an erroneous principle in assessing the damages. There seems to be no doubt of the long delay in delivering at Cincinnati the one box of machinery, and it is pretty clear that the Chronicle Company were injured by the delay in the way

stated in its petition. But it is claimed that the value of the machinery in the box was but \$140, while the damage for delay in delivering it was \$767.93, and that such damages for violating the contract of transporting and delivering the property at Cincinnati could not have been contemplated at the time the contract of transportation was made; and that notice was not given that the plaintiff was liable to the loss by delay, which it is now claimed it sustained. One witness, Mr. Birtwhistle, testified that the machinery contained in the box lost could not be replaced for less than one thousand dollars.

Mr. Armstrong, the agent of the plaintiff, who made the purchase of the machinery and also the contract of transportation, informed the company's agent at the time of the contract that it was machinery for printing a newspaper; that the plaintiff was ready to commence its publication, and that delay would be very injurious; and that the carrier company agreed to carry the goods to their destination, Cincinnati, in four days. This witness stated that he found that he could ship the machinery by another line, which would agree to take it to Cincinnati in five days; but that he preferred this defendant's line because it would undertake to carry the machinery in four instead of five days, and he informed the defendant's agent of that circumstance. The lost machinery was afterward found and returned, and arrived at Cincinnati on the same day with the new machinery which was ordered after the loss was discovered. But as the procurement of the new machinery was made necessary by the loss of the box, and the lost machinery was of no use to the plaintiff when it came, and could not be disposed of, the damage was nearly the same as if the loss had been absolute. Now, it is claimed that the court erred in allowing the wages of the men while they could not work for want of this lost machinery. From the nature of the business of the plaintiff, the employes could not be discharged so as to stop their wages without greater damage than the loss of their wages while procuring the

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lost machinery. It is also claimed that no notice was given to the carrier that such machinery could not be obtained at Cincinnati. It seems to us that the notice was sufficient in this case to warn the carrier of the consequences of a failure to keep their contract of transportation, and that the court was right in allowing it to the extent to which it appears to have been allowed. One hundred dollars was charged, and probably was allowed, for cost of men employed to find the lost box, and fifty dollars for expense of telegraphing. These seem to have been necessary expenses to avoid the more serious charge of negligence.

We can not say that the judge committed error in allowing these items.

We are satisfied that where, in a case of this sort, a carrier was informed, as it was here, that the publishers were waiting for the machinery to be transported from New York, and were ready to commence the publication, the notice was sufficient to make the carriers liable to such necessary and direct consequential damages as those which the judge seems to have allowed in the present case.

This we hold as matter of law. On the question whether the judge was correct and judicious in his estimate of these items, we do not find reason to interfere.

On the whole case, we conclude to affirm the judgment.

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E. G. GARRISON v. W. A. GROGAN ET AL.

An antenuptial contract, by which the wife is to receive less than the value of her dower interest in the estate of her husband, must be reasonable, as compared with the rest of his estate and in respect of the circumstances of the parties to the contract, in order to be enforced by a court of equity. Where the husband owned a lot of ground thirty-five feet in front on Fifth street in Cincinnati, and by an antenuptial agreement settled upon his wife, in lieu of dower, a life estate in one-third of ten feet only of said lot, and where the personal estate was found to be only \$74, such agree-

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ment was held not to be reasonable, and the court would not enforce it, by preventing the widow from having dower assigned in the thirty-five feet of ground.

*Swormstedt*, for plaintiff.

*Goodman & Storer*, for defendant.

Taft, J. This was a petition for dower filed by Emma Garrison, as widow of Wm. Grogan, deceased, making Wm. H. Grogan, only son and heir of her husband, and John Parker, the administrator of his estate, parties defendant. The suit is by her next friend, Edward L. Parris, she being a married woman.

The answer of Wm. H. Grogan, by his guardian, avers that the petitioner, who was the second wife of his father, Wm. Grogan, entered into an antenuptial agreement, by which she accepted as her jointure, in lieu of dower, a lot of land in the answer described, which was, by the agreement, to be in full of her right in the estate of the deceased, unless he should make further provision by his will; and that by his will he gave her all his personalty, and gave his son, the defendant, all the rest of his estate except what was settled upon the petitioner by the antenuptial agreement.

That after his father's decease, the petitioner declined to accept the bequest under the will, but did receive, under the order of the court, all the personal estate, which was but \$74.

To this answer the plaintiff demurs. Reference is made by the plaintiff's counsel to the case of *Stilley and wife v. Folger*, 14 Ohio, 610, in which the suit was for dower, and the defense set up was an antenuptial agreement giving the wife \$600, in lieu and bar of dower.

It was held "that a reasonable antenuptial agreement would bar the wife's dower, though its terms were not such as to constitute a good legal jointure," and that inasmuch as there was no showing that the agreement was not reasonable under all the circumstances, the agreement was held to be a bar. The court says, "There is not, however,

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with the proofs, anything satisfactory to show the value of the real estate of the husband, or of which he died seized; and without such evidence, no such deduction can be legitimately drawn," and dismissed the bill.

In the present case, the antenuptial agreement was not a legal jointure, and is to be sustained, if at all, as an equitable bar to the right of the widow to claim dower.

In *Murphy v. Murphy*, 12 Ohio St. 417, the court said, "That it might, therefore, be well doubted whether the bare contract itself, although fair and reasonable in its terms, and *bona fide*, entered into by the parties, could, unless within the statutory provision, constitute a defense to a claim for dower at common law, or by writ of dower on the part of a widow. Indeed, it might be doubted whether the contract so made and entered into by the parties prior to the marriage, although valid as an antenuptial contract, would, in law or equity, constitute a bar to the plaintiff's right to dower in the land." Section 4 seems to embrace precisely such a case in the provision, "That when any conveyance, intended to be in lieu of dower, shall, through any defect, fail to be a legal bar thereto, and the widow, availing herself of such defect, shall demand her dower, the estate and interest so conveyed to said widow shall thereupon cease and determine." But in that case, the plaintiff had received the property intended by the antenuptial agreement to be in lieu of dower, and accepted the provisions of the will in her favor, which were predicated upon the performance of the agreement on both sides, and to allow her to have dower also would have been inequitable and unjust to the heirs.

In the present case, it seems that the plaintiff has not taken dower under the agreement, nor received the bequest under the will. From the petition it appears that the deceased was the owner of a lot of ground in the city, 35 feet in front by 116 feet in depth, and the agreement gave to the petitioner a life estate in one undivided third of ten feet of said lot, making  $3\frac{1}{3}$  feet. And the personalty which she

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would have received under the will, and which she did receive from the court, was but \$74.

The court at Special Term held that this was not a reasonable agreement. It allowed the widow less than a third part of what the law would have given her. The judge regarded it as inequitable to enforce such an agreement.

We should have been better satisfied with the plaintiff's petition if it had stated more specifically the circumstances of the deceased as to his indebtedness or otherwise, and the value of the property. We do not regard it as essential to a settlement by an antenuptial agreement, that it should give the wife as much as the law would give her. A case might exist in which it would be reasonably less.

In the present case, however, there does not appear to be any good reason why the wife should not have her dower in this small estate, or its equivalent, and we have concluded to affirm the judgment at Special Term.

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HOLLINGSHEAD v. L. A. GREEN & CO.

The defendants were stock brokers, and had money belonging to the plaintiff, to the amount of \$1,600, on deposit as a margin on purchases and sales of stock made and to be made under a contract between the defendants and plaintiff. The plaintiff gave an order to the defendants to sell his Pittsburg, Fort Wayne and Chicago Railroad Company stock, and two hundred shares of Erie stock, which was one hundred more than he then had on hand. This order was not obeyed, but a larger amount of Erie stock was purchased, contrary to the plaintiff's order. If the order of the plaintiff had been obeyed, the amount on deposit would have been increased to \$2,100, while the course taken resulted in a loss. The plaintiff called for his money, and was told by the defendants that if he would let it remain they would work the account, and would repay him all his money, viz: the \$2,100, acknowledging their obligation to refund it. The defendants continued to speculate on the fund, and lost it all, and more.

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*Held*, that the defendants worked the account at their own risk, and were bound to refund to the plaintiff the \$1,600 which he had when he gave the order which was disobeyed, and the additional \$500 which he would have had if his order had been obeyed.

In General Term on Error.

*Matthews & Ramsey*, for plaintiff.

*Hoadly & Johnson*, for defendants.

Taft, J. The original suit in this case was brought to recover \$2,100 of money in the hands of the defendants as stock brokers, left as a margin on certain railroad stocks purchased and held by the defendants for the plaintiff.

From the bill of exceptions, it appears that the plaintiff deposited \$1,000 in money, which amount was increased by certain purchases and sales till the plaintiff had about \$1,600 on deposit, as margin on a quantity of Pittsburg, Fort Wayne and Chicago Railroad Company stock, and Erie Railroad stock.

On the 20th of July, 1868, the plaintiff ordered the sale of his stock, and of one hundred shares of the Erie short—that is, his order was to sell one hundred shares more than he then had—which order was disobeyed by the defendants, and a loss was sustained thereby. If the order had been obeyed, the amount on deposit would have been increased to \$2,100.

Finding that a loss had been caused by this disobedience of orders, the defendants told the plaintiff to give himself no trouble about it; they would work it out and replace the money, viz: the \$2,100, acknowledging the indebtedness.

We think from the evidence that they assumed the responsibility of the loss, and for the further operations, or, as they call it, "the working of the account." When he called for payment of the amount to which, by his contract with them, he was entitled, they requested him to



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let it remain, and they would make the amount good to him; in other words, would pay him the money. The weight of the evidence is to that effect. That was their duty, and they could not undertake less than that with the expectation of satisfying their customer, who seems to have understood his rights too well to waive them.

It was claimed by the counsel for the defendants that after the loss by the disobedience of the order to sell, a second contract was made, by which the account was to be worked out at the risk of the plaintiff, and that this contract waived the loss on the former, and that the plaintiff thereby assumed the risk of the second working of the account. The judge at Special Term could not so hold, and found for the plaintiff the amount of his fund, including both that which the plaintiff had on deposit before the order to sell the Erie stock, and the additional sum which he would have had on deposit if his order had been obeyed.

We regard the finding of the judge correct on this point, nor do we find any ground on which to interfere with the judgment at Special Term.

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**E. C. BRYANT ET AL. v. THE OHIO COLLEGE OF DENTAL SURGERY.**

Where a close corporation, created by special act of the legislature, which provides for no issue of stock, for the purpose of an endowment obtained moneys and issued the following certificate: "Ohio College of Dental Surgery. This may certify that Dr. A. J. Reeves is entitled to one share of the real estate property of the college, drawing an interest of six per cent., and transferable only in accordance with the constitution of the college association:"

*Held*, that the said certificate is a measure of the holder's interest in the corporate property, and is a contract with the holder to pay a certain

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rate of interest upon the said share so long as the corporation carries out the purposes of its creation.

Where no time is mentioned for paying the interest: *Held*, that it is payable in a reasonable time.

Reserved to General Term.

*DeCamp*, and *Matthews & Ramsey*, for plaintiffs.

*King*, *Thompson & Avery*, for defendant.

HAGANS, J. This case, which was before us last October term, now stands on a second amended petition, with two causes of action stated. To the first of these a demurrer is interposed, and a motion to strike out the second, and both are reserved here for determination.

The plaintiffs sue as the administrators of Dr. A. J. Reeves, upon a certificate, of which the following is a copy:

"OHIO COLLEGE OF DENTAL SURGERY.

"This may certify that Dr. A. J. Reeves is entitled to one share of the real estate property of the college, drawing an interest of six per cent., and transferable only in accordance with the constitution of the college association. Shares \$100 each.

"CHAS. BONSALL, AND OTHERS,

"*Trustees.*

"CINCINNATI, *February 20, 1854.*"

The defendant is a corporation. The plaintiffs allege, in the first cause of action, that their intestate paid the defendant said money, whereupon the defendant, by said trustees, made and delivered said certificate. The petition describes the real estate referred to in the certificate, being the property on which the college building stands, on the west side of College street, between Sixth and Seventh streets, Cincinnati, and alleges that said real estate was held by said trustees and certain other persons at the date of the certificate, under a bond for title, and that in May, 1854, conveyance thereof was made to said trustees for the

use of the corporation and of the several persons who had advanced money to it to be used in the purchase and improvement of the premises, and to secure the payment of the interest to accrue on said certificate, and others of like nature issued to other persons. They allege that no interest has been paid to them, and that there is due on the certificate interest from February 20, 1854, and ask for judgment therefor.

This corporation was created by special act of the legislature of Ohio, January 21, 1845, which provides for no stock or stockholders as such, but is by the act made what is popularly known as a close corporation, its board of trustees being self-perpetuating. Its by-laws and other regulations are not pleaded, and we may conclude there is nothing in them inconsistent with the charter. It has the power to sue and be sued, acquire, hold, and convey property *for the endowment* of said college, to contract and be contracted with, etc. See Local Laws of Ohio, vol. 43, page 32.

It is fair to infer, from the allegations of the petition, that the money paid to the trustees named was to constitute a fund for buildings and improvements for the use of the corporation and to enable it to carry out the purposes of its creation, and with no expectation or purpose of its ever being repaid so long as those purposes were subserved. But it was expected that profit would be made by the establishment and operation of the college, and the corporation was willing, therefore, in order to establish and operate the college, and to get the necessary means to do so, and as an inducement to its friends to make contributions, to pay them interest on the sums they might advance, and to pledge to each person, possibly in an unauthorized and insufficient form, what is called the "shares in the real estate property of the college." These "shares" merely measured the extent of the contributions made by each and all, but entitled those who held the certificates of shares to none of the rights and powers of share or

stockholders as such, so far as is shown. For this is not a stock company, and has none of the usual features of such a corporation; but by the charter it had the right to make contracts, such as obviously promoted its purposes and beneficially served to accomplish its objects. We see no reason why it might not make and be bound by such a contract, as set out in the certificate sued on. It is an obligation or promise to pay, not the principal sum—for that the contributor was willing to hazard in the enterprise so long as it was carried on—but to pay the interest on the principal sum, absolutely and unconditionally, for that the contributor demanded as the price of his assistance to the corporation. There is no allegation that the corporation has failed of its purpose.

The certificate is not stock, but it is a contract to pay interest on \$100 from its date, leaving, as it seems, the principal sum by way of endowment, or as the measure of the holder's interest in the corporate property, in the nature of a security, if the corporation should fail of its purpose, as well as the foundation and extent of the obligation entered into on its part.

But it is said that no time is fixed for the payment of the principal, and that the interest is not payable until the principal is due. Upon this construction, the interest would never be payable so long as the corporation was in existence and carried out its purpose. Even though it might be fully able to pay, the contract to pay could not be enforced, though possibly that condition makes no difference. But here there is no express contract to pay the principal at all, but to pay the interest on an admitted sum in the use of the defendant, from which sum it reaps all the advantages of that use. And it must be held, having contracted absolutely to pay the interest, the defendant meant to be bound by it. And we must further hold that by this contract the payment of the interest was not to be indefinitely postponed.

We are rather disposed to consider the interest named

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in the certificate not as interest strictly, and that, as any other debt where the instrument creating it is indefinite as to the time of payment, it is payable in a reasonable time.

The demurrer must be overruled, with leave to answer.

The second cause of action sets forth that the plaintiffs are the heirs at law of Dr. Reeves, and as such entitled to share in said real estate; and as they are not advised who the other shareholders are, they ask that the defendant disclose them, and pray the appointment of a trustee, the ascertainment of all the interests, a judgment for the interest, a sale, and a distribution of the proceeds accordingly.

The statement of this cause of action shows the propriety of the motion.

Motion granted, and cause remanded for further proceedings.

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**THE WHEELING, PARKERSBURG AND CINCINNATI TRANSPORTATION COMPANY v. THE BALTIMORE AND OHIO RAILROAD COMPANY.**

Where summons was issued against a foreign corporation and the return of the sheriff was as follows: "Served the within named the Baltimore and Ohio Railroad Company, by delivering a true copy hereof to H. F. Heckert, the general freight agent of said company, personally, at the usual business office of said company, no other chief officer being present."

*Held*, that the amendment to section 66 of the Code does not repeal section 68, and that under section 68 this service is sufficient.

In General Term on Error.

*S. & S. R. Matthews*, for plaintiff.

*Hoadly & Johnson*, for defendant.

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HAGANS, J. These are two foreign corporations, and the cause of action arose out of this State. The suit is for damages done to the steamer "Rebecca." It is alleged that the defendant was constructing a railroad bridge across the Ohio river at Parkersburg, and for that purpose used a barge, which, on the night of December 7, 1869, was unlawfully and negligently left tied to one of the stone piers of said bridge, swinging in said river, in the course vessels usually take in ascending and descending, without lights or watch on the barge. By reason of which the "Rebecca," without her fault or negligence, ran upon the said barge, and, by mere force of the blow and collision, a hole was broken in the forward part of the hull, whereby she was sunk and became totally lost, to the damage of the plaintiff thirty thousand dollars. Summons was issued and service was had as follows: "Served the within named the Baltimore and Ohio Railroad Company, by delivering a true copy hereof to H. F. Heckert, the general freight agent of said company, personally, at the usual business office of said company, no other chief officer being found." A motion was made, the defendant appearing for that purpose only, to quash and set aside the service of the summons.

On the hearing of the motion, it appeared that Heckert's agency consisted of contracting for freight over defendant's road, and in attending to the transfer of freight to and from the connecting roads of the defendant's road, which has been shipped to or from any point on defendant's road on through bills of lading; that the defendant is a foreign corporation, operating lines of railroad in Maryland, Virginia, and West Virginia, having possession of two lines of said road in Ohio by lease—one extending from Bellair to Columbus, and the other from Newark to Sandusky, no part of either of which roads or branches extends into or within Hamilton county, Ohio. It also appeared that the line of the Marietta and Cincinnati Railroad extended from a point opposite Parkersburg into Cincinnati, in which line the defendant is largely interested, as an owner of stock, more

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than any other single stockholder, but less than a majority of said stock; that the relations of the two corporations are those of close amity, and running arrangements exist between them by parol, by which through freight passes over either road from the other without change of cars, upon a *pro rata* division of the compensation, and that the vice-president of defendant is president of the Marietta and Cincinnati Railroad Company; and that the same running arrangement exists between defendant and the Little Miami Railroad Company; and as a specimen of the manner of doing the business, a blank bill of lading is attached to the bill of exceptions, in which said Heckert is styled "general agent."

The judge at Special Term overruled the motion, and exception was taken.

This is a transitory, not a local action, which may be brought wherever service can be obtained, as we find nothing in our statutes to restrict jurisdiction. All foreign corporations doing business in Ohio do so by the comity of the States. It did not unfrequently occur that they objected to the jurisdiction of our courts, although reaping great profits from business done in the State; and so the legislature has made special provision with respect to foreign life insurance companies (S. & S. 222), and general provisions with respect to other foreign corporations, as to service of summons.

By section 68 of the Code, which has never been repealed or amended, "where the defendant is a foreign corporation, having a managing agent in this State, the service may be upon such agent."

This court has, in the case of *Hopkins v. The Baltimore and Ohio Railroad Company*, which was an action for personal injuries arising out of this State, where the service was on the same H. F. Heckert, as agent, held that he was a managing agent within the meaning of this section. *American Express Company v. Johnston*, 17 Ohio St. 641.

But it is said that section 66 of the Code was amended since the decision of that case, and that now service must

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be had under it. See S. & S. 542. This section, before its amendment, was held by the court, in *Barney v. The New Albany and Salem Railroad Company*, 1 Handy, 571, not to apply to foreign corporations. The amendment is as follows: "And if such corporation be a railroad company, either foreign or created by the laws of this State, and whether the charter of such company prescribe the manner and place, or either, of service of process on such company, such summons may be served upon any regular ticket or freight agent of such company in any county in this State in which such railroad may be located or through which the same may pass." And it is claimed that inasmuch as the railroad of the defendant is not located in this county, nor passes through it, no service in any case can be had on the defendant, except by way of proceedings in foreign attachment. But we do not understand that the amendment to section 66 of the Code has repealed section 68, any more than the same amendment repeals section 49 as amended, which provides for service on railroad companies created by the laws of this State. See S. & S. 542. By comparing the provisions of the Code and the various amendments in this regard, it will be seen that the policy of the legislature of this State has reference to the convenience of our citizens in asserting rights, and to the accessibility of the tribunal, where wrongs are inflicted by these corporations. So that now even the ticket or freight agents scattered along at the various stations, in every county through which the line of the road passes, whether owned or leased, may be served with process. These provisions of the Code are therefore cumulative, not restrictive or exclusive.

The judgment will be affirmed.



## AUGUSTUS S. LUDLOW v. AUGUST WILlich, Auditor.

Where a tract of land was listed and assessed, and the taxes paid, and afterward an error in the number of acres in the tract was discovered, which the owner reported immediately to the auditor, that officer is not authorized by section 70 (2 S. & C. 1463) of the tax act to assess and levy, himself, upon said tract the back taxes for the excess discovered.

Reserved to General Term.

*Stanton & Richards*, for plaintiff.

*Scarborough & Williams*, for defendant.

HAGANS, J. The plaintiff seeks to enjoin the county auditor from the collection of taxes, alleged to be in arrear for a number of years, upon a tract of land now admitted to contain ninety-five acres. It has been appraised and listed for many years as a lot of twenty-five acres. It appears, from the testimony, that the grantor of the plaintiff owned the whole section, and sold off it, from time to time, several parcels until it was discovered that there was an excess in the section, which not unfrequently occurs, and as soon as it was discovered, the excess still belonging to him was put on the duplicate for taxation by him, whereon the auditor assessed, and was about to collect, back taxes for some twenty years, and this proceeding was brought to restrain him from so doing. It appeared that both the plaintiff and his grantors acted in good faith; that the tract was always listed, assessed, and the taxes paid, and that it was described on the duplicate as containing twenty-five acres, though in fact, but without the knowledge of the owner, it contained ninety-five acres.

It is claimed that section 70 of the tax act (2 S. & C. 1463) furnishes the authority to the auditor for proceeding as he did. That section reads as follows: "It is hereby made the

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duty of every person seized of, or holding lands \* \* \* to list the same for taxation with the county auditor, on or before the third Monday of May next after the same shall be subject to taxation; *and in case of neglecting to list the same as aforesaid*, the county auditor shall, when the same shall thereafter be listed, charge upon *each tract so neglected to be listed* the taxes for each year the same shall have been omitted after becoming liable for taxation, together with " a penalty and interest. Under this section the auditor proceeded arbitrarily, and, it seems to us, without any authority, to make up the amount of what he denominates back taxes, and charged it upon the land, and sought its collection. He certainly pursued no method pointed out by the statute for ascertaining the amount, but supposed that by the necessity of the case arising under this section 70, he had authority to ascertain the amount himself by going through the process of a supposed assessment and levy. This might be a dangerous exercise of power, though we know of no complaint on that ground in this case. He might assess back taxes anywhere and for any length of time at discretion. At all events, we think the exercise of such a power by the auditor unauthorized and illegal.

But was this a case for levying the back taxes under the circumstances of the case? The *tract* was listed, assessed, and the taxes paid. The description of the number of *acres* in the tract was simply a mistake, of which even the owner was unapprised until he himself reported it to the auditor as soon as discovered. That it had been up to that time omitted was the fault of the assessor of the district, upon whom, by section 29 of the tax law (2 S. & C. 1450), devolved the duty "to make out and deliver to the auditor of the county a return, in tabular form, contained in a book to be furnished by such auditor, of the amount, description, and value of the real property subject to be listed for taxation in his district, which return shall contain," among other things, "the description of each tract, designating the number of acres," etc. This was his sworn duty. The owner did not

know of this excess. The same excess has happened in many of the sections, growing out of inaccuracies in the original surveys, and yet not until it was subdivided and accurately surveyed had the owner any knowledge on this subject. His tract was listed and assessed, and the number of acres was, in some respects, immaterial, except so far as it might enable the auditor to ascertain the value of different parcels when subdivided. How, then, can the provisions of section 70 apply to this case? The owner's duty had been performed, and he did not *neglect* to list the excess for taxation, and it is only in that case that back taxes are chargeable. It was rather an omission of duty upon the part of the officers of the law, the penalty of which is nowhere by the statute imposed upon the owner. It would, therefore, be wrong to allow these taxes to be assessed and collected in the manner sought. None of the other sections of the tax law seems, to a majority of the court, to have any application to this case, except section 70, and clearly this case is not within it, and we can not legislate it in.

The injunction must be made perpetual.

Taft, J., dissented, as follows: This was a suit to enjoin the auditor of the county from collecting back taxes on a lot of ninety-five acres of land, which has been appraised and assessed as a lot of twenty-five acres for some twenty years past, and on which the auditor now proposes to enforce the payment of taxes as ninety-five acres, and of correspondingly greater value.

The defendant, the auditor, answers and denies that the lot has been listed and assessed, or that taxes have been paid thereon.

The simple question to be decided is whether a lot or tract of ninety-five acres of land, having been listed and taxed as a lot of twenty-five acres for twenty years, the auditor can, under the statute, require the owner to pay back taxes as on ninety-five acres.

Here was a plain mistake in the number of acres in a

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tract. It appears that this tract was a remnant of a much larger tract, from which sundry parcels had been, from time to time, sold off. It is possible, perhaps probable, that there was a surplus in the original tract, so that this remainder, after the sales, contained more actually than it contained theoretically, and that it was listed according to the original estimate. It is not a strange circumstance for a tract to be bought and sold, and taxed, as an original survey of five hundred acres of land, when it contains a surplus, by actual measurement, of as much as seventy acres, which is about the excess in the present case. But here is a case where the discrepancy between the theoretic and actual number of acres is greater than usual. This may result, as we have suggested, and probably does result, from the fact that the surplus is all contained in this remnant, and none of it in the parcels which had been conveyed.

The defendant claims the right to collect back taxes on this land under section 70 of the tax act of April 5, 1859. This section "made it the duty of every person seized of or holding lands as mentioned in the first section of this act, to list the same for taxation with the county auditor, on or before the third Monday of May then next after the same should be subject to taxation, and in case of neglecting to list the same as aforesaid the county auditor should, when the same should thereafter be listed, charge upon each tract so neglected to be listed the taxes for each year the same should have been omitted after becoming liable for taxation, together with twenty-five per centum penalty, and six per centum interest thereon, in addition to the taxes of the current year."

This presents a difficult question. If back taxes, which should have been assessed and paid, can not be collected under this section, it is not easy to find any authority by which it can be done. If a lot has been appraised, and yet has been altogether omitted from the duplicate, it seems to me that this section gives the auditor the power to bring it upon the list, and to enforce the payment of back taxes,

as well as the taxes for the current year. The appraisal would, in such a case, furnish a guide for the proper assessment for each year, and the amounts to be collected would be readily ascertainable; and under that section the property-holder would be himself guilty of neglect in suffering his lot to remain off the duplicate. If a man owns a tract of land which has been neither appraised nor assessed for taxes, nor listed, it would clearly be the duty of the owner, under that section, to list it, so that it might be appraised and taxed. If it has been omitted altogether, it appears to be the intent of this section that the auditor shall list it and charge the taxes, with the penalties and interest. In this latter case the auditor would have to appraise and assess it himself for each year, as there is no other provision for doing it. As the object of the act is equitable, and not at all in the nature of a forfeiture, so far as the payment of the tax itself is concerned, it is not in accordance with judicial construction to let the statute fail because the specific manner in which it is to be enforced is not specified. Under another provision in the tax act, the auditor is intrusted with the duty of ascertaining the value. To make this section effectual it is necessary that he should do the same thing under this section. Rather than allow this just provision to fail, it becomes necessary to hold that the statute intends that he shall exercise that power and that duty, and I think it reasonable to so hold.

The question then arises whether here has been such an omission. A tract of land purporting to contain twenty-five acres has been taxed for several years. But the plaintiff has owned ninety-five acres during the same time. Have these seventy acres been omitted, or have they been listed?

If the plaintiff had, himself, listed it as twenty-five acres, would it have been a compliance with this requirement of the act, which requires every owner to list his lands for taxation? It seems to me not. The discrepancy is too great; and although it is the *tract* of land which is regarded in listing for taxation, the number of acres is one of the ele-

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ments of listing which can not be ignored, and is not ignored in the description of tracts of land for taxation. If the owner should describe his land as in the wrong place, if he should locate it in a desert instead of a fertile part of the country, it would be a vain thing, and not a fulfillment of his duty; and so if he represents a tract as containing twenty-five acres when it actually contains ninety-five acres, I think he has failed to perform his duty, and that there are seventy acres of his land omitted from the list, for which he ought to pay back taxes for the time during which he has so listed his land. Nor can I perceive any hardship in such an application of the provision.

We are now brought to the precise case before us. The owner has not listed his land, but says that the assessors have done so, and that he is not responsible for the accuracy of their description or appraisement. The auditor finds a tract listed as twenty-five acres, and he finds that there are seventy acres which have not been listed nor appraised, and he brings it upon the duplicate, and charges it with the back taxes, ascertaining the value as best he can, and we are called upon to enjoin him.

Now, if we suppose that he is right in his estimate, and that seventy acres of this land have not been estimated or appraised for taxes, ought we to enjoin him from proceeding? I think not. But it is claimed that the whole tract may have been fairly appraised, though described as but twenty-five acres. If that is so, the plaintiff should at least come forward with a showing to that effect, before asking an injunction to stop the auditor in the performance of a duty which the statute has devolved upon him.

It is said that back taxes are charged by the auditor on the entire lot of ninety-five acres, when taxes have been paid on twenty-five acres. If that is so, a decree might be drawn correcting the list in that particular.

I do not intend to hold that the statute contemplates that every inaccuracy of description of the number of acres in a tract of land is sufficient to justify the auditor in claiming

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back taxes. But I do think that the omission of three-fourths of the land from the description is a ground on which the auditor may well take the matter in hand, and if satisfied that the three-fourths omitted from the description have not been included in the appraisement or assessment, may list it under section 70. It is a question of fact which, in the first instance, the auditor must decide.

Section 29 (2 S. & C. 1450, 1451) shows that the number of acres is an element of the listing.

Section 33 (2 S. & C. 1452) shows that the auditor may, in certain cases where it is necessary, or where there is no assessor to ascertain it, ascertain the value of lands for taxation, and carry them into the duplicate.

Section 35 (2 S. & C. 1453) shows how the auditor may, from time to time, correct errors in the name of the owner, in the valuation, description, or quantity of any tract or lot contained in the list of real property in the county, but is not to deduct anything without authority from the board of equalization.

Section 47 requires the county auditor to make list of taxable property, with separate tracts, etc.

Section 48 requires him to assess taxes to be levied for the current year, adding the taxes of any previous year that may have been omitted.

Upon the whole case, I am of opinion that the injunction should be dissolved.

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JEROME B. WILLIAMS, Plaintiff, v. BENJAMIN C. TRUE ET AL.,  
Defendants.

Where it was ascertained after the trial of a cause had commenced, that one of the jurors had sat upon a former trial of the same cause, and the court thereupon offered to discharge the jury and continue the case, but the plaintiff, against whom the former verdict had been rendered, consented to go on with the jury as it was, the plaintiff could not, after the

verdict was again rendered against him, object to its validity on the ground that said juror was in the panel.

In General Term on Error.

*John B. Eaton, W. C. Mellen, and Kebler & Whitman*, for plaintiff.

*Benj. C. True and Judge Okey*, for defendants.

**TAFT, J.** This cause has come up on error to the Special Term, in not granting a new trial.

The grounds urged in argument for a reversal are two:  
 1. That the jury which rendered the verdict had one juror who had been a juror on a former trial of the same cause.  
 2. That the verdict was against the weight of the evidence.

It appears that after the trial commenced, it was discovered that one of the jurors had been a juror on the former trial. The counsel for the plaintiff proposed that that juror should be excused, and that the trial go on with the eleven. To this the defendants objected, and then the court offered to discharge the jury and continue the cause. The plaintiff then consented to go on with the twelve, including the juror who had been one of the jury on the former trial. The verdict rendered was the same as that rendered by the jury on the former trial, and the plaintiff claims that he ought not to be bound by it. Affidavits were read by the plaintiff, on the motion for new trial, to show that Taylor, the juror who sat on both trials, was hostile to the plaintiff, because he had expressed an opinion, since the trial, that the verdict should have been for a hundred dollars against the plaintiff, and before the trial had expressed an opinion in favor of the defendants.

He had expressed one opinion, undoubtedly, by the former verdict, and could have been excluded from the jury if the plaintiff had chosen to do so, either by making the inquiry and the request before the jury were sworn, or by refusing to go on after it was ascertained that Mr. Taylor



had rendered one verdict against him. But he preferred to go on, and consented to try the case with Taylor as one of the jurors. The time of the court and witnesses and parties was expended in trying the cause. The court would not have consented to go on with the trial, with the understanding that if Mr. Taylor changed his opinion on the evidence to be offered, and found a verdict for the plaintiff, it should stand, but if he adhered to his old opinion and the other eleven united with him in a verdict for the defendants, the case should be tried again. We think that it is too late, therefore, to object to Mr. Taylor that he had been on the former jury. It was a decisive objection, if taken in time, or if not expressly waived, and one which we should have expected a juror himself to have discovered on the statement of the case. But the court can not lend itself to the trial of cases merely by way of experiment, to see which way they will go, without determining anything, unless they go for the plaintiff. The objection was waived. *Hull v. Albro*, 2 Disney, 147.

As to the claim of personal hostility or prejudice on the part of the juror, we do not think that the affidavits show such a case. When the plaintiff consented to Mr. Taylor sitting on that jury, he had the best evidence that the juror had formed and expressed an opinion against him on the evidence as exhibited on the former trial; and the affidavits show nothing more.

On the second point, that the verdict was against the weight of the evidence, we have read the testimony as preserved in the bill of exceptions, and have not been able to find reasons for ordering a third trial of the cause.

It is quite possible that the result would have been different if the case had been submitted to the court instead of the jury. But we do not discover sufficient reason in the evidence to defeat a second verdict and require a third trial. The public has an interest in bringing suits to an end when they have been fairly tried.

The judgment will be affirmed.

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Cleveland v. Duryea's Adm'rs.

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JOHN B. CLEVELAND, Plaintiff in Error, v. S. L. DURYEA'S  
ADMINISTRATORS, Defendants in Error.

Showing when the statutes of limitation of other States may be pleaded and in what manner.

A verbal promise to pay a debt, barred by the statute of limitations of Ohio, is not sufficient to revive the original debt; such a promise must be in writing.

Action for goods sold and delivered.

In an action for goods sold and delivered, the defendant pleaded the statute of limitations of Ohio, claiming that the cause of action had not accrued against him within six years preceding the beginning of the action, as the merchandise on which a recovery was sought was sold to him early in February, 1861.

The plaintiffs replied that the defendant was out of the jurisdiction of the courts of Ohio at the time the cause of action accrued, and had absconded, and was concealed until less than two years prior to the beginning of this suit; and further, that on the 22d of December, 1861, the defendant made and delivered to the plaintiffs' intestate a written acknowledgment of the obligation upon which the action was brought, promising to pay the same.

Subsequently the petition was amended by the further statement that the defendant was out of the State when the amount claimed became due, and never afterward came into the State until less than six years before the date of filing the original petition.

An amendment to the reply was afterward made, averring that the cause of action stated in the petition did not accrue in the State of Ohio, and that both the plaintiffs' intestate and the defendant were then non-residents of the State of Ohio; and that the defendant absconded in less than one year after the cause of action accrued, and was concealed from January 1, 1862, to September, 1867.

On the trial it appeared that the plaintiffs' intestate was

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a resident of New York, and the defendant a resident of St. Louis, Mo. The contract for the sale and purchase was made in St. Louis, in February, 1861, and the following November the defendant left St. Louis, came to Cincinnati, and publicly carried on business and resided there until this action was brought.

On the 22d day of December, 1861, the defendant wrote to the plaintiffs' intestate, regretting that he had not been able to pay him anything upon the account, as his business had been very dull, but thought in a few weeks it would be better with him, and he would remit what he could; it would be all right, and the intestate would not lose a penny. After the defendant's removal to Cincinnati, both in the years 1867 and 1868, he verbally promised to pay the amount due, living at that time and doing business within that city.

Judgment was rendered for the plaintiff, on submission of the case to Special Term, and a motion for a new trial being overruled, this proceeding in error was taken.

*Peck & Crawford*, for plaintiff in error.

*Sayler & Sayler*, contra.

STORER, J. By the pleadings there is no denial of the original indebtedness, the only defense set up being the statute of limitations. The statute in force in Ohio at the time this suit was brought has alone been pleaded. When the cause of action arose, whether at the time the goods were sold and delivered, or whether credit was allowed for payment, does not appear definitely, but we may infer from the pleadings that it accrued in St. Louis, where the defendant resided. It can not have accrued in New York, for it does not appear that both parties, buyer and seller, were within that jurisdiction at the time the purchase was made.

It is not claimed that the limitation prescribed by the

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laws of either New York or Missouri are relied upon. The answer presents the Ohio statute alone. The original, as well as the amended reply, does not set up the fact that, by any exception contained in our statute, the limitation there prescribed can be avoided. It is only alleged that when the cause of action accrued, the defendant had absconded and left the State, and his residence was not known to the plaintiffs' intestate until two years before the commencement of this action.

On a careful examination of the bill of exceptions, we can find no evidence to sustain the reply. On the contrary, the defendant is proved to have remained where the contract was originally made until after the debt was due, of all which the plaintiffs' intestate was fully aware. It is further in proof that the defendant publicly left St. Louis, closing his business there, changing his residence to Cincinnati, in 1861, where he pursued the same employment he had formerly been engaged in without any concealment. So far, then, as the defendant's residence and his removal and the allegations connected with those statements go, we do not find that the plea of the statute is answered.

But it is said the promise made by the defendant in his letter of December, 1861, is an answer to the statute. We apprehend, however, it can not be regarded as defeating the statute of limitations, but as giving only to the creditor the privilege of withholding the legal prosecution of his claim for the additional period that elapsed between the time the debt became due and the date of the new promise. As it is not shown by either party when the debt actually became due, we are left to apply the ordinary rule, that where merchandise is not sold for cash, the ordinary credit must have been understood between the buyer and seller.

It is difficult, then, to say when the statute began to run, although it is evident when the letter was written the limitation of the statute had commenced. But between the date of this new promise and the bringing of

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this action eight years had elapsed, and as no written promise—as our statute requires to revive the debt—has been proved, we must conclude the plea of the statute must be sustained. The verbal promises, made in 1867 and 1868, can not be admitted to defeat the plea as a substitute for what our law expressly requires shall be in writing.

As we have already said, we are not permitted to take notice of the law of either Missouri or New York unless it is pleaded, and in the absence of all evidence as to what the laws of those States require, we are bound to consider only the statute of our own State.

We think the judgment should be reversed, and the parties have liberty to amend their pleadings by setting up as a reply to the defendant's plea the statute of the State where the cause of action originally arose.

Cause remanded for further proceedings.

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WM. M. RAMSEY, Adm'r *de bonis non* of Robert McLean, v.  
JAMES MCGREGOR ET AL., Adm'rs of Robert McGregor.

Action against A., as administrator. A. pleaded the statute of limitations, and that the matter had finally been disposed of in the probate court, and no appeal taken.

Also, that he had deposited the trust fund with E. & M., bankers in good standing, to the credit of the estate, and that by their failure, without any negligence of his, the loss occurred.

*Held:* 1. That unless irregularity was shown, the proceedings in the probate court were a complete bar.

2. That an administrator acting in good faith is not responsible for loss incurred by the failure of a bank of good credit, wherein he had deposited the funds of the estate, to the credit of the estate, and did not mingle them with his own.

This action is brought to recover of the defendants a large sum of money, which it is alleged was in the hands of their

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intestate, at the time of his death, belonging to the estate of Robert McLean, of whom Robert McGregor had been the administrator. The plaintiff charges the amount thus unadministered by McGregor to be, with interest, \$10,796. McGregor died in August, 1866, having previously, in May, 1863, resigned his administratorship, and the plaintiff was appointed by the probate court to act in his stead. In 1865, McGregor paid over to the plaintiff \$2,800, on account of McLean's estate, leaving the balance now demanded still in his hands. After his death, in September, 1866, the defendants took out letters of administration on his estate, and the plaintiff presented the claim of his intestate against McGregor for allowance by the defendants, which was refused. The present action was begun by the filing of the petition, December 8, 1870.

The defendants set up four grounds of defense:

1. That the action against them was not commenced within four years, as required by the act of November 1, 1840, section 101, S. & C. 585.

2. That the whole matters involved in the suit were passed upon, decided, and finally disposed of in the probate court of Hamilton county, in the progress of the settlement of the estate of Robert McLean, on the application of his then administrator, Robert McGregor, and that no exception or appeal has been taken to the judgment of said court, but the same remains unreversed.

3. That the defendants' intestate was appointed administrator of McLean in 1854; that within five months thereafter he had reduced the property, which came into his hands for administration, to cash, the entire proceeds being \$8,367.15, and without waiting for the period allowed by law to distribute the assets in his hands, he called the creditors of McLean together and proposed to make a division of the money in his hands, if they would indemnify him against any creditors who might afterward present their claims. This proposition was rejected, and McGregor then deposited the amount in his hands with Ellis & Mortou, who,

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at that time, were bankers in good credit, and enjoyed public confidence. This deposit was made in his name as administrator.

That the depositaries afterward unexpectedly failed and made an assignment of the effects, from which the defendants' intestate received the amount which was paid to the plaintiff in 1863. This deposit was kept in the name of the administrator, and was never used by him for his private purposes, gain, or profit, and was made in good faith, with the same bankers with whom McLean, in his lifetime, had transacted business and kept his bank account.

4. A general denial of indebtedness.

The plaintiff demurred generally to the whole answer, and the cause was reserved to General Term.

*H. Snow and Matthews & Ramsey, for plaintiff.*

*Noyes & Taft, contra.*

STORER, J. There is no denial of the first defense, nor any replication setting up the legal exceptions that might save the statutory bar, if pleaded and proved; but, on the contrary, the demurrer admits the facts pleaded, and we are bound to regard it as a full answer to the action, if the proceedings referred to were had in the mode required by the statute of February 7, 1856, sec. 86, 2 S. & C. 1218. This section was an amendment of the law of May 1, 1854, which authorized appeals to be taken from any order of the probate court in settling the accounts of executors and administrators, and prescribed the mode of proceeding to effect that object; but under the old practice no such privilege was allowed. Whenever an order was made or a settlement had within the court of common pleas under the law relating to insolvent estates, the act of that tribunal was regarded as a final adjudication, and could not be impeached except by a bill in equity, and although that remedy can not now be resorted to, we must adopt the same rule in giving effect to

the orders of the probate court, while they remain in force. *Negley v. Gard*, 20 Ohio, 810.

The third ground of defense presents directly the question, did the administrator of McLean neglect his duty in depositing the assets which came into his hands with Ellis & Morton, after the creditors had declined to receive their dividends before the administrator was bound to declare them, provided he should be indemnified against subsequent claims? This involves a simple question of legal duty on the part of the trustee.

The liabilities of executors and administrators are those that grow out of and are necessarily attached to the fiduciary relation they have assumed. Good faith and the care that any prudent man would exercise in the management of his own affairs are essential to the just performance of their duties. They can not be excused for neglect of what is plainly for the interest of the trust confided to them, nor for the want of foresight to avail themselves of every opportunity to make profitable the fund over which they have the control. They can not, therefore, use it for their private purposes or advantage, and they may be compelled to account for any profit they may have made from employing it. They can not, with any propriety, become the depositaries of money belonging to the trust, nor mingle it with their own; nor may they place the sum in bank to their own account, and avoid thereby the possible loss of the deposit by the failure of the depository.

This statement of the duties of the trustee is but the result of the established rule, both at law and equity, where his conduct is questioned, and practically results in the inquiry, has the trustee acted in the discharge of his duties as he ought to have done in the management of his own business?

We need not refer to cases that recognize the rules we have suggested, as it would be useless labor. If we find the principle is established, we are not required to quote a long list of authorities to sustain it. We may only refer to



2 Williams on Executors and Administrators, 1647; 2 Story's Equity, sec. 1272; Tiffany & Bullard on Trusts, 481, 482, who recognize the rule we have stated to its fullest extent, and have quoted the English and American authorities to sustain it.

We find, then, as the demurrer admits, the facts stated in the answer, that there is no just charge of omission of duty or legal delinquency in the conduct of McGregor. There is no ground to infer that the depositaries of the fund were not such that a prudent, cautious, and just man would not have confided to their charge his own funds, and the loss can not, therefore, be imputed to McLean's administrator.

With these views, we must overrule the demurrer to each of the causes of defense, with leave to the plaintiff to amend his pleadings and reply should he so decide to do.

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FREDERICK BENNINGER ET AL. v. JOHN A. GALL ET AL.

If, in an action by A. against B. and others, claiming an existing partnership, and asking for a dissolution and account between the parties, it should appear the parties had been incorporated under the general law of Ohio, and the corporate body had not been dissolved by judicial decision, the action can not be sustained.

What is evidence of the organization and existence of a corporation, and when a corporator is estopped to deny the fact of the incorporation.

Case reserved to General Term on the pleadings, a statement whereof is as follows:

The plaintiffs claim that in June, 1866, they, with the defendants named and many others, formed a copartnership under the name of the ——— Butchers' Association, the object of which was mutual protection against cattle speculators and high prices in cattle, as well as to provide

a fund by contributions from each in monthly installments of two dollars. This fund was to be used in buying cattle, to be sold only to members of the association, and the profits thus realized were to be retained to increase the fund, which was ultimately to be divided among the members.

They further claim that on several occasions they have demanded an account of the profits, and also of the capital, of such copartnership, and a settlement of its affairs, all of which have been refused. That this copartnership has been dissolved, and the funds thereof are now in the hands of George Slemmer, one of the defendants, who, in conjunction with John A. Gall and others made defendants, is now about to divide the funds, which have largely increased, ignoring the rights of the plaintiffs. They then pray that the cause may be referred to a master to state an account between the association and its members; that a receiver be appointed to take charge of the moneys and assets of the copartnership, and for a judgment for such sums as may be found due them respectively from said defendants or such of them as may be possessed of the same, and for general relief.

The defendants specially named, in their answer, deny that they, with many others, as is alleged, ever formed a copartnership with the plaintiffs under the name of the Butchers' Association or any other name, or that any copartnership ever existed between them, or that there are any partnership funds or moneys in their hands; or that the plaintiffs are entitled to any statement of account of the profits or capital of any copartnership, or entitled to any such relief as prayed for. Their answer further states, that the defendants, in conjunction with many others, on July 23, 1866, were associated together and composed a benevolent association in the county of Hamilton, and on that day, at a meeting of a majority of the members duly called for that purpose, the association elected five of their number as a board of trustees, and then and there also resolved to adopt as its name "The Association of the Butchers of Cincinnati for Mutual Protection and Relief;" and further re-

solved to become an incorporated company under the laws of Ohio, directing the secretary to make out a record of the proceedings of this meeting, to be certified and delivered to the recorder of Hamilton county for record, as provided by the statute. That the secretary did make such a record and certified the same to the recorder, and the same was duly recorded; that the record of the said proceedings bears date August 3, 1866, and on and from that day the trustees and their associate members and their successors became, and still are, invested with the powers incident to corporations aggregate; that the corporation still exists, having been organized as required by the statute; that John A. Gall is the president, and George Slemmer is treasurer thereof, and all moneys in his hands belong to the corporation and not to the plaintiffs; that the plaintiffs have each been members of the corporation, but are not now, and were not at the commencement of this action, two having ceased to be members by voluntary resignation, and one of them having been expelled for a violation of the by-laws. They further deny that the plaintiffs have any right to an account of the moneys belonging to the corporation and now in the hands of the treasurer, and say that all the acts of the defendants in the premises were done as officers and members of the corporation only.

The plaintiffs reply that no such corporation as set up by the defendants ever legally existed; that they were never members thereof, and that the members of the association never had any legal right to claim the privileges of an incorporated body.

The judge at Special Term reserved the whole case for the opinion of the court at General Term.

*Forrest & Lindemann*, for plaintiffs.

*Caldwell, Coppock & Caldwell*, for defendants.

STORER, J. The only question made by the parties on the testimony, as embodied in the bill of exceptions, is this :

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Benninger et al. v. Gall et al.

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Was the relation subsisting between the plaintiffs and defendants a copartnership or that of corporators?

If the members of the association were partners only, it is clear to us that the pleadings must be amended before we can claim jurisdiction to decide the questions necessarily involved in the controversy, as before any relief could be given, all the partners should be made parties, either as plaintiffs or defendants. It is not a case where a common right is involved, to protect which one or more of those intrusted in preserving it is permitted, in consequence of the multiplicity of parties, to sue for themselves as well as for those who may join in the action, but where we must determine the rights and liabilities of all by one judgment. As a discovery is sought and a reference asked of all the matters connected with the association, all who are liable to contribute should appear on the record. We can not, then, unless the proper allegations are made, be permitted to assume the power to settle a controversy when our judgment would bind only those named in the pleadings.

We can find no reported case where such a rule as that relied on by the plaintiffs has been held to exist; while the admitted principles upon which the liabilities of copartnerships, their interests and protection, must be determined, will be violated if such an anomalous course is pursued. This court has heretofore held what the true rule is, when a controversy in which a common interest is involved may be directed, though all who are interested need not be joined, in *Ruffner v. Commissioners of Hamilton Co.*, 1 Disney, 47, and we need not now more fully restate the rule. And the Supreme Court admit fully the doctrine in *Matheny v. Golden*, 5 Ohio St. 861.

It is claimed by the defendants that the parties in this litigation never were copartners, but, on the contrary, were members of a corporate body, to establish which we find in the record a certificate of the recorder of Hamilton county that the requirements of the statute authorizing the members of voluntary associations to become corporate bodies

were complied with; and the evidence of such compliance, so far as the legal existence of the corporate body is concerned, is established.

In the *Ashtabula & N. L. R. Co. v. Smith*, 15 Ohio St. 328, it was held that when the act to provide for the creation and regulation of incorporated companies is complied with, the corporators and their associates become a body corporate.

Subsequent to the deposit of the articles of association with the recorder, and the issuing of his certificate, the parties to this action, plaintiffs as well as defendants, met and completed their organization and complied with the duty imposed by their charter and the by-laws. They had adopted and afterward paid the installments required of the members for more than a year, giving their notes to the corporators as stipulated in the by-laws, thereby admitting the existence of the corporation, and conforming in other respects to the rules prescribed for its government.

We must hold, upon these facts, that there was a corporation, not only created by the acts of the association in causing the record to be made to which we have referred, but the subsequent conduct of the parties who now ask our intervention in their behalf. They have practically admitted the allegations of the answer, and should, on principle, be estopped from denying them in this litigation. *Trumbull County Mutual Ins. Co. v. Horner*, 17 Ohio, 407; *Vorhees v. Receivers, etc.*, 17 Ohio, 468.

The question then arises: Can there be any collateral inquiry into the power of the legislature to grant a corporate franchise, whether conferred by special enactment or by general law, as provided in the constitution?

In an action by a corporation against a defendant, who has already admitted its existence, he will not be allowed to question it. We must recognize the same rule as applying wherever it is sought voluntarily to deny the legal existence of the corporate body. We feel bound to hold, in every such case, that the legislative grant must be regarded as

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valid while the statute conferring it is unrepealed, or the franchise has not been declared forfeited on *quo warranto*. On this ground, a defendant will not be allowed to prove that the charter was obtained by fraud, especially if the attempt to do so is made by a subscriber to the stock who accepted the charter, and assisted in putting it into operation. Angell & Ames on Corporations, 644, 645; *Charles River Bridge v. Warren Bridge*, 7 Pick. 344; *Bear Camp River v. Woodman*, 2 Maine, 404.

So if there has been an excess of corporate authority, the acts done being clearly *ultra vires*, we may resolve the question into a negation of the power, which would be but equivalent to doing similar acts without any corporate authority whatever. But such acts do not, *per sese*, avoid a charter until a forfeiture of the franchise has been first judicially declared. Angell & Ames, 644, and cases cited. In the case before us, the corporation was created under section 66 of the act of April 9, 1852, claiming in part the purpose of conferring benefits upon the members, not only by subserving their individual interests, by protecting them in their particular calling in a mode not inconsistent with public policy or against law, while in case of sickness or accident, aid from the common fund was to be given to the members; and we must suppose the object we have stated was regarded in good faith, and could not be intended to advance or effect any other design, and whether the officers of the corporation have fulfilled their duties or not, is not here a matter of inquiry. Sufficient is it that the body still exists which claims corporate powers, and we can not, in the collateral way now attempted by the plaintiffs, avoid their corporate acts, or by our decision virtually repeal their charter.

On the whole case, we are all of the opinion that the plaintiff can not, in this form of action, obtain the relief he seeks. The petition will be dismissed without prejudice.

## JOSEPH DECAMP v. A. O. GASKILL ET AL.

By contract with G., D. performed work and labor for necessary repairs on the separate property of G.'s wife. G. paid for part, and gave his note for the balance. G.'s wife verbally admitted that her husband was acting as her agent, and saw the work going on without objection. The property was conveyed to a third party by contract dated the day of service of process in this suit brought by D. to charge the wife's estate with satisfaction of a judgment already obtained on G.'s note.

*Held*, 1. That the acceptance of G.'s note, and recovery of a judgment thereon, was no bar to the separate liability of his wife's estate.

2. That the wife's estate was liable for debt incurred by G. on the credit of her property; and after receiving the benefit she was estopped to deny her liability, which equity would enforce.

3. That it was not necessary to describe the particular property sought to be made liable, but that equity would enforce the demand against her property in general.

4. That the specific property on which the repairs were made was liable, after sale, in hands of purchaser, under section 79 of the Code.

Suit against husband and wife, asking judgment against the wife alone for work and labor done, and material furnished, at the request of the wife and under a verbal agreement with her, in repairing and making additions to a house, then her separate property. The amount claimed is \$252 and interest. Both defendants were served with process, and answer denying that any contract was made with the wife, or that the work and materials were furnished at her request, but averring that the contract was made with the husband, and that he had given the plaintiff a note for \$277, whereon a judgment had been recovered, which was shown by the evidence to be unsatisfied.

To this answer there was no reply. By the evidence on the trial, it appeared that the whole bill was \$428, on which Mr. Gaskill had paid \$230; that Mrs. Gaskill had said to the plaintiff that she fully intended the amount should be paid; that her husband was her agent in the making of the contract, and that the debt was just and ought to be paid.

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It was proved that the repairing was necessary, and that Mrs. Gaskill saw the work going on and raised no objection to it. The note of Mr. Gaskill to the plaintiff was made by him at the plaintiff's request, and Gaskill admitted that he attended to his wife's business in this matter. The property on which the work was done was conveyed the day this suit brought.

At Special Term judgment was given for the defendants. A motion was made for a new trial and overruled, to which ruling a writ of error was taken.

*Decamp*, for plaintiff.

*Pruden*, contra.

HAGANS, J. It will be seen that this suit is not brought to enforce a mechanic's lien, but is simply an action on an account for work and labor done and materials furnished, on repairing the wife's property, which has since been conveyed to a third person, the time for taking a lien having long since expired. The objection made to a recovery, that the husband had given his note for the amount sued for in this cause, and that a judgment had been recovered thereon against him and execution issued, is, we think, of no avail, as it nowhere appears that the note was given in satisfaction of the debt. What was done by the plaintiff after obtaining this note is not sufficient evidence to preclude the maintenance of this action against the wife, if it can be maintained at all. They are not jointly liable.

We are all of opinion, upon the testimony, that Mr. Gaskill acted in behalf of his wife in obtaining the work and materials, wherefore it must be inferred that she intended to charge her separate property. There is no question but that the work and materials were for the benefit of her separate estate, or that the debt was incurred on the credit of her property. She received the benefit of the work and materials, and though there was some testimony looking to a remonstrance with her husband against having the work



done, she did not stop it as she might have. It would be inequitable after it has been done, and the benefit of it realized, as the property has since been sold, to allow her to set up such a defense. The Commission of Appeals of New York, in a case just reported (*The Corn Exchange Insurance Co. v. Babcock et al.*, 42 N. Y. 615), under a statute much broader than our act of March 23, 1866 (S. & S. 391), rendered an ordinary judgment against a married woman, where she had indorsed her husband's note as his surety, without consideration and without benefit to her, charging in the indorsement her separate estate with the payment of the note. And the Court of Appeals of Kentucky have gone quite as far in a cause decided as long ago as 1852. *Bell and Terry v. Kellar*, 18 B. Mon. 385.

Without discussing these authorities and their application to our legislation, it is enough to say that our statute clearly makes a wife's property liable on a contract made by her or with her authority or assent for the benefit of her separate estate. Our Supreme Court has so held in construing this statute in a case to be reported in 20 Ohio St., *Phillips et al. v. Graves et al.*, that a married woman may charge her separate estate, real or personal, with her debts to the whole extent that the same were incurred for the benefit of her separate estate or for her own benefit on the credit of her separate property, and that the intention to exercise such a power at the time the debt is incurred may be either express or implied, and that a court of equity will enforce the payment of such charges:

1. By appropriating the personal property;
2. By sequestering the rents and profits of realty; and,
3. By a sale of the realty when necessary.

There is no dispute that the contract here was for the benefit of the separate estate of the defendant and upon the credit thereof, and, as we have seen, her estate must be held liable.

The property in which the work was done has been con-

veyed after the suit was brought. It does not appear that the defendant has any other separate property. We have no doubt that the specific property upon which the work was done could be charged with this debt, if it were still in the ownership of the defendant, or if sold during pendency of the suit. But we do not think that there is any good reason that the liability should be confined to that property alone. It is unnecessary that the specific property to be charged should be described when the contract was made. This question has been much mooted in New York, and in *The Corn Exchange Ins. Co. v. Babcock et al.*, all the commissioners hold, Hunt, Gray, and Earls, Commissioners, giving separate opinions, in which they review and collect the authorities in England and elsewhere, that "there is no more propriety in the principle sought to be sustained than there would be in holding that the promissory note of a male adult must describe the property seized on execution issued on a judgment recovered on the note. The law holds all the property of the maker or the obligor responsible for its satisfaction. The judgment, when recovered, creates the lien."

That was an action at law. The precise point is clearly stated in *Ballou v. Dellaye*, 37 N. Y. 35, where, in reversing the judgment below, Parker, J., says, "I have no doubt that the obligation the defendant took on herself was for the benefit of her separate estate, which is therefore chargeable in equity for the payment of the deficiency in question. In such a case the liability attaches, not as a specific lien on any particular portion of her estate, but upon the whole of it. Her separate estate, as a whole, becomes liable for any indebtedness contracted by her for its benefit to any extent." See also *N. A. Coal Co. v. Dyett*, 20 Wend. 570. When, however, the suit is in equity the proceedings and the judgment should specify the property to be subjected. Here the property on which the work was done is described in the petition.

It has already been stated that the property in question

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was conveyed during the pendency of the suit. If it be true that this is the only property the defendant has, can it be charged with this debt in the hands of the vendee? There is a contract for the sale of this property, dated on the very day process in this suit was served. This contract was filed among the papers by the defendant, but not attached to the bill of exceptions. Nor is there any evidence on the subject in the bill of exceptions except a vague statement that the property had been sold. Certainly if the suit were pending when this sale took place, no interest could be acquired by the vendee against the plaintiff. Code, sec. 79; 2 S. & C. 966. The vendee would take *cum onere*, and we take it for granted that it constituted the whole of the wife's separate realty at the time the contract was made. But the whole testimony is too vague on several material matters for a fair consideration. The evident purpose of the action is to charge this property.

On the whole case, we think the judgment should be reversed and the cause remanded for further proceedings.

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A. N. WEXELBERG v. H. EBERHARDT & Co.

On a trial before a referee, who rendered a judgment on a counter-claim in favor of the defendants, the plaintiff made a motion for a new trial and took no bill of exceptions; but, after the referee's report was filed, made exceptions thereto, which the court overruled and rendered judgment for the amount found due by the referee in favor of the defendants—to all which the plaintiff excepted, but took no bill of exceptions.

*Held*, that there is nothing in the record properly before the Court which can be noticed on error.

*Mallon & Coffey*, for plaintiff.

*Huston & Shunk*, for defendants.

HAGANS, J. This was a suit for damages, for a breach of a contract for a division of the profits of the sale of certain

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stoves which the defendants were to manufacture and deliver to the plaintiff. The plaintiff alleged a failure to deliver stoves according to the contract. The defendants denied all the allegations, and alleged, by way of counter-claim, a failure of the plaintiff to receive and sell, whereby they suffered great damages in the loss of patterns, etc., as well as a balance of account for sales that had been made.

The whole cause was referred to H. P. Lloyd, Esq., as a referee, to take testimony and to report his findings of law and fact. After hearing the testimony, which is very voluminous, the referee rendered judgment in favor of the defendants, on the counter-claim, of \$2,574.19. The defendants made no motion for a new trial before the referee and took no bill of exceptions. But after the report was filed the plaintiff filed several exceptions to the findings of both law and fact. On motion of defendants these were overruled by the court, and the report was confirmed and judgment entered for the defendants for the amount as stated by the referee. To all which the plaintiff excepted, but took no bill of exceptions.

We are all of opinion that the cause is not properly before us, as there is no bill of exceptions, nor indeed anything which we can notice.

Judgment affirmed.

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HENRY BRACHMAN v. ERASTUS M. SMITH, Adm'r of Albert R. Wise.

B. holding under deed from C., "*beginning sixty-six feet west of Vine street,*" giving thirty-three feet front, conveyed by same description to W., who again, by same description, leased back to B. The deeds of the premises previous to C.'s deed to B. erroneously described it, "*beginning sixty-five feet west of Vine street,*" giving thirty-four feet front, and on this line the division wall stood. The adjacent owner tore down this wall, and B. sued W. on the covenants of his lease.

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*Held*, that the language of the deeds from C. to B. and B. to W., and the manifest intention of the parties, overcame the presumption arising from the existence of the boundary wall, and that B. was estopped to claim the right of quiet possession to more than thirty-three feet.

**ERROR TO SPECIAL TERM.**—This was an action upon the covenants in a lease alleged to have been made by Albert R. Wise, in his lifetime, by which he demised to the plaintiff certain premises on Third street, Cincinnati, for the term of five years, at an annual rental of \$1,500. A copy of the lease is made a part of the petition, wherein the property leased is described as part of lot 180 as numbered on the plan of Cincinnati, beginning at a point on the south side of Third Street, sixty-six feet east of Vine street, extending thence eastwardly on Third street thirty-three feet, thence southwardly at right angles with Third street ninety-nine feet, thence westwardly on a line parallel with Third street thirty-three feet, thence northwardly to Third street, the place of beginning, being the same premises conveyed to the lessor by the said Brachman."

The petition alleged that the plaintiff was in the possession of the premises under his lease, in which his lessor had covenanted that he should peaceably and quietly hold and enjoy during his term, without any hinderance on the part of the lessor and those claiming under him. Nevertheless, on the first day of July, 1864, one Joseph Trounstine, with others unknown, lawfully claiming under the intestate, and with his authority, but against the will of the plaintiff, entered the demised premises and evicted him therefrom, tore down one wall of the building erected thereon, and destroyed the fixtures, furniture, and improvements of the plaintiff therein, whereby the plaintiff was deprived of the possession of the premises, and compelled to expend large sums of money in protecting his merchandise and other chattels with which he carried on his business therein.

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The administrator of Wise answers denying all liability on the part of his intestate, for any act alleged to have been done by him or any person in his behalf, or by his consent, as is charged in the plaintiff's petition, claiming also that the lease made to the plaintiff was of the same premises described in identical language by metes and bounds, which the plaintiff used in the conveyance to the intestate on the same day the lease was executed; that at the time it was understood between the parties that Joseph Trounstine, who owned the property immediately west of the leased premises, and whose east line was the real west line of the leased premises, was about to erect a very large building, the east wall of which would take one foot of the ground where the west wall of the leased premises then stood, and certain stipulations in the lease were accordingly inserted manifesting the intention of the parties, as well as their mutual knowledge of the facts. These stipulations were: first, that the lessee should only hold the premises to the same extent as the lessor could claim if he had continued the occupier; second, that the lessee was to pay for all necessary repairs during the term, both parties being aware that these repairs would include whatever expenditure would be required to protect the lessee in the event the improvements contemplated by Trounstine should be made.

The answer further stated that if Trounstine did erect the new wall, taking down the west wall of the premises, he had the legal right to do so, as the old wall stood entirely upon the land owned by him, which the plaintiff well knew at the time he conveyed the property to the intestate and received in return the lease upon which this action is brought. That the work done in constructing the same was carefully and properly executed, and no more injury was done, if any was actually sustained, than the plaintiff must have anticipated when he received his lease; that Trounstine's east wall is now the permanent west wall of the leased premises; and that the lessee has had,

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and still continues to have, the possession and enjoyment of thirty-three feet of ground, as called for in the plaintiff's deed and intestate's lease.

A general denial of the whole answer was set up by way of replication.

The trial at the Special Term was had by a jury, and a verdict returned for the defendant.

To the refusal of the Court to grant a new trial, the plaintiff excepted and the cause taken to General Term on error.

*George E. Pugh and Gazley*, for plaintiff.

*George Hoadly and Challen*, for defendant.

STORER, J. The errors alleged are predicated upon the improper admission of testimony, and the exclusion of legal evidence, as well as the refusal to grant a new trial, on the ground that the verdict was against the law and the evidence adduced on the trial.

The exceptions taken to the evidence offered and allowed to be read on the trial have not been pressed in argument, and we need not now consider them, for we are satisfied that the rights of the parties can be determined upon that portion of the testimony which we find fully stated in the bill of exceptions, and to which no objection seems to have been made.

A brief history of the title to the premises is this: On the eleventh day of July, 1859, Brachman became the owner, by deed from Coolidge, which described the boundary as beginning and ending exactly as we find it stated in the conveyance from Brachman to Wise and the lease from Wise to Brachman. But it was then known that there had been a mistake in describing the boundary of the premises in the deeds of some of the proprietors prior to Brachman's purchase, the true line beginning sixty-six feet from Vine street, though stated to be but sixty-five.

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Thus Coolidge, who obtained his title from one Ogden, in 1858, under an agreement to purchase made in 1838, took possession of the premises with the understanding that his western line was only sixty-five feet from Vine street, and built his west wall accordingly. Thus the fact must have been well known to Brachman at the time of his purchase from Coolidge, for it was then evident, by the description in his deed, that measuring sixty-six feet from Vine street, instead of sixty-five feet, must include the west wall of the building as it then stood. Indeed, the subsequent conveyance by Brachman to Wise must, we think, beyond doubt establish the clear understanding of the parties as to the extent of his purchase. In 1864, after Brachman had been Wise's tenant for nearly a year, Trounstine, who had already contemplated the improvement of his ground between Wise's west line and Vine street, having previously made an agreement for that purpose with Wise, took down a portion of the west wall of the premises in dispute and placed the foundation of his own east wall on what was claimed to be the true line between the parties, erecting thereon a large and valuable building. This work necessarily exposed the plaintiff's premises, and interfered with his business during the time that was required to make the improvements of which Brachman subsequently enjoyed the benefit. It is, then, for the damages sustained by taking down the old wall and the construction of the new that this action is brought.

At the time Trounstine made the alteration, Wise was absent from the State, and so remained several months, and if we connect this fact with the allegation in the petition, that the wall was taken down by Trounstine, we hold it to be very doubtful whether any case is made against Wise. How far the averment that Trounstine "lawfully claiming under Wise and with his authority," is sufficient to create a liability for a trespass, is at least very questionable. We need not now determine the question, as we are sat-



isfied, on the whole case, the plaintiff has no right of action against the defendant's intestate.

When the plaintiff obtained his title from Coolidge, he could not have been ignorant of the true boundary line of the adjacent premises on the west. The wall then standing was evidently erected on the supposition that the premises on which it was built were to be measured sixty-five feet from Vine street, and he could not, therefore, claim anything by his occupancy, on account of an erroneous boundary. It was alike obligatory on all parties, if the fact were known, to regard it in the light of a mistake rather than as an estoppel upon both. Nor would the statute of limitations give any additional privileges, since as long before the bar, if it could be claimed it ever existed, the boundary was deemed to be the true one, and nothing could have been gained by mere acquiescence.

We admit the rule that known and established monuments control the quantity of the estate granted, if they have existed for the term prescribed by the statute, and in the meanwhile have been always regarded as defining a division line; but when the boundary is questioned by such unequivocal acts as we find in the record, the proposition made by the plaintiff can not be sustained.

A disputed line may be settled by the mutual consent of the adjacent proprietors, if such consent is clearly proved, and has long been acted upon. But there must be no misapprehension on the part of those who determine the boundary as to the state of fact which then exists. Both must be informed of the true character of the matter in dispute, and when thus advised, connected with subsequent occupation by the agreed line, the controversy must end. The parties have then settled all matters in dispute. Where, however, a vendee fixes a boundary line which coincides with the description in his deed, and afterward finds the description to be erroneous, his subsequent re-conveyance of the premises to his gran-

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tor under the true description establishes the fact of an erroneous boundary, which the original grantor or his grantee will not be permitted to dispute.

In the case before us, Coolidge conveyed the premises to Brachman by its true description, and Brachman with the same description granted to Wise. He following the description used in his deed, leased back the premises to Brachman, which, we think, clearly shows that none of the grantors supposed they had any right beyond what had been already distinctly defined. They must be estopped to deny what they have so solemnly admitted. Any other determination on our part would give to the plaintiff thirty-four feet of ground, when he claimed no more than thirty-three feet by his deed from Coolidge and his conveyance to Wise.

On the assumption that Townstine was the real owner of the ground upon which he erected his east wall, he had the undoubted right to take possession of it and appropriate it to his individual advantage. The plaintiff can not claim adversely to his own acts, and if there is evidence to authorize us to hold that the wall was taken down in a careful, skillful manner, and no injury was caused other than what would have been the necessary result of erecting the new wall, we must apply the rule which governs when owners of party walls find it proper for either to take down the common structure in order to rebuild it. *Hieatt v. Morris*, 10 Ohio St. 523.

All the facts submitted to the jury have been passed upon by them, and their finding upon the evidence is, in our opinion, consistent with the law of the case. And neither in the rulings of the court on the questions submitted at the trial, in the charge to the jury, or in the exclusion or admission of testimony, do we find any error.

Judgment affirmed.

## STEPHEN W. WILKINS v. THE TOBACCO INSURANCE CO.

W., the owner of an insurance policy, wrote to the company, "Consider your policy, No. 39, as canceled from the 18th inst. and make a new policy from that date for one year, with privilege added, at same rate." The company answered, "I can not agree to proposed change, and therefore cancel, *pro rata*, charging returned premium." A subsequent loss occurred, prior to the date of the expiration of the original policy.

*Held*, that W.'s letter was not a cancellation of the policy, but, until accepted, a mere proposition so to do.

That the proposition was indivisible, and if not accepted as a whole the original contract remained unaltered, and W. was not estopped to sue thereon.

Case reserved from Special Term on motion for new trial.

This action was brought upon a policy of insurance issued by the defendants on the 3d day of July, 1867, to one M. Pyne, by which he was insured, in the sum of \$3,000, upon the steamer St. Patrick, against all the usual risks while navigating the Ohio and Mississippi rivers below Cairo, during twelve months from the date of the contract. The policy was afterward assigned by Pyne to the plaintiff.

Two causes of action are alleged in the petition. In the first, damages are claimed for a loss which occurred in October, 1868; in the second count it is averred the defendants are liable for another loss which took place on the 18th day of April, 1868.

There was no dispute, when the case was tried in Special Term, as to the liability of the defendants for the loss first claimed; but it was denied, when the second loss occurred, there was any contract of insurance in existence upon which this action could be brought, the defendants alleging that as early as November, 1867, the policy was canceled by the consent of all parties in interest, and no subsequent liability thereon can now be claimed.

The evidence adduced by the defendants to prove the fact is contained in two letters—the one written by the agent of

the insured, dated St. Louis, November 20, 1867, and directed to the secretary of the defendants, in these words:

"Please consider your policy, number 39—\$3,000, M. Pyne, on steamboat St. Patrick—as canceled from the 18th inst., and make a new policy for \$3,000 from that date for one year at same rate, 137, valuation \$33,750 (fixed by our inspector), limit \$22,500, *balance* as old policy, with privilege of Mississippi added. Please send policy and premium note, and I will collect amount due and remit at once.

"Yours truly, A. W. HOWE."

To this letter the secretary replied, on the 24th day of November, 1867:

"MR. A. W. HOWE, ST. LOUIS, MO., *Dear Sir:* Your favor of the 20th inst. at hand. I can not agree to the proposed change in policy on steamboat St. Patrick, and therefore cancel "pro rata," charging for four and a half months. *Returned* premium, \$243.75. Yours truly,

"SAMUEL S. YOUTREE, *Secretary.*"

No other correspondence then passed between the parties, though it is charged by the defendants their secretary had written a similar note to the insured himself, directed to St. Louis, but there is no proof he ever received it or knew anything of the correspondence that had already passed between the secretary and Howe. It was also in proof that Pyne, the insured, was not a resident of St. Louis but of Memphis, and there was no evidence that the insured, either by himself or his agent, Howe, ever assented to the act of the secretary in canceling the policy, or that they considered it to be canceled, but, on the contrary, while the policy was still in their possession, in the month of April, 1868, the insured applied to the defendants for permission to assign to a third party, which was refused.

Several instructions were asked by the plaintiff's counsel at the trial below, some of which were given to the jury and some refused; those not given were but the statement of the

same proposition in other forms contained in the first instruction asked by the plaintiff. That instruction was this, "That the letter of November 20, 1867, by Howe to the defendant, contains a proposition to cancel the policy and issue another for the same amount, and that the defendant's reply so treats it, and is not an assent to that proposition but a rejection of it, and does not, with the letter first named, constitute a new agreement and a cancellation of the policy sued on."

This charge the court refused to give, and the jury found for the defendants on the second cause of action. A motion for a new trial was made by the plaintiff, and the case was reserved for the opinion of the court in General Term on the motion.

*Lincoln, Smith, Warnock & Stephens*, for plaintiff

*Hoadly, Jackson & Johnson*, contra.

STORER, J. On the case made by the pleadings and the evidence, the only question we are now bound to determine is this: Did the letter of the agent contain a simple request to cancel the policy without qualification or condition, or was it a request to change the policy then existing by the substitution of another?

When the letter was written the contract of insurance would not, by its terms, have expired until July, 1868; and we might well inquire what object would the insured have had to release the underwriters from their contract without any benefit secured to himself, thus virtually abandoning all claim to a security, the terms of which had already been agreed upon, without receiving any equivalent in return.

On the theory of the defendants, as argued by their counsel, the proposition made by the agent authorized the defendants to release themselves from all further liability at once, leaving to their option whether a new policy should be issued upon the terms stated in the proposition, while the

plaintiff, on the other hand, claims it to have been the offer to cancel this policy, on condition a new one should issue with the privilege of navigating the entire Mississippi river instead of that portion of it to which the insured was already restricted.

If we hold the proposition was single only, the rule must be applied that it should be accepted by the party to whom it is addressed according to its terms; there must be no qualification in the assent to be given by the other party, or else there can be no mutuality in the agreement. In the language of Judge Washington, in deciding the case of *Eliason v. Henshaw*, 4 Wheaton, 228, "It is an undeniable principle of the law of contracts, that the offer of a bargain by one person to another imposes no obligation on the former until it is accepted by the latter according to the terms in which the offer is made; any qualification of or departure from those terms invalidates the offer unless the same be agreed to by the person who made it; until the terms of the agreement have received the assent of both parties the negotiation is open and imposes no obligation on either." Following this exposition of the law Mr. Parsons, in his work on Contracts, vol. i, 746, very judiciously remarks, "The principle may be stated thus: The assent must comprehend the whole of the proposition; it must be exactly equal to its extent and provisions, and must not qualify them by any new matter." But we need not refer to the cases where the doctrine is admitted without reservation; it would not be a duty on our part, nor add to what is an established canon in the law of contracts. We do not regard the quotations from digests, made frequently without order in the arrangement or even in the chronology of the cases cited, as tending to improve our legal perceptions or strengthen the argument made in a cause. We presume, without hesitation, that the law upon this point is not to be doubted, and our duty is to apply it to the case before us.

It is said that if the proposition is to be regarded as indivisible, the silence of the agent or the insured himself, after

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the act of the defendants in annulling, as it is claimed they did, their agreement, was evidence of their assent to what was done. Such might be the effect of mere silence, where a party was bound by the relation he bore to another to express his assent or dissent unequivocally. It must be, however, in such a case where an obligation is imposed, not where the debtor informs his creditor that he proposes to cancel or has canceled his liability, without any equivalent being rendered in return. No one, we think, would require of the creditor an express denial of the right of the debtor to discharge an existing liability unless it might be in language not altogether complimentary. Certainly the entire omission to notice what had been done by the debtor could not be seriously held to create an estoppel, in manners, in morals, or in law.

If we recur to the alleged authority in the agent's letter, it is clear to us it must be construed to confer the right to cancel an existing agreement only by substituting another, and if the substitute was refused, while the power is nevertheless claimed to discharge the contract absolutely, the defendants have disregarded altogether the proposition made by the plaintiff's agent, and have acted wholly inconsistently with its terms. As has been already stated there is no evidence that the insured acted upon the supposition there had been a discharge of the defendants' liability; but it would seem the vessel still continued to be navigated without any new insurance in other offices, until she was lost in April, 1868. Now, if the assumption of the defendants can be sustained, the insured must have been, during the whole time, his own underwriter, while months after the alleged cancellation he applied for leave to assign the policy, manifesting thereby he had no idea it did not exist; and it must not be forgotten, the evidence of the cancellation is to be found only in the letter of the secretary, the original policy being always retained by the insured.

We are satisfied there was no evidence of the assent of the insured to the act of the insurer; that any entry made by

the defendants on their books would not justify them in claiming it, as, if made at all, it was unauthorized by the insured, and could not be offered as a defense to the second cause of action in the petition.

We are further of opinion the judge who tried the cause erred in refusing to give the first instruction, as prayed for by the plaintiff, and that the motion made in Special Term, for a new trial, should have been granted.

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THE COVINGTON AND CINCINNATI BRIDGE COMPANY, Plaintiff  
in Error, v. L. H. SARGENT, Defendant in Error.

In 1856, S. subscribed for stock in the bridge company. By private acts in 1859 and 1861, and the public act of 1865, the company were authorized to issue "preferred stock," but did issue not only "preferred stock," but new "common stock," the old common stock having been disposed of. Subsequently the company sued S. for his unpaid subscription, and recovered judgment. S. paid the judgment, demanded his stock, and was tendered shares of the new issue of "common stock," which he refused, and brought suit to recover what he had paid.

*Held*, the authority granted to issue "preferred stock" did not include the power to issue new "common stock."

That as the company had disabled itself without S.'s assent from delivering the stock he had contracted for, he could recover as on a failure of consideration.

That the judgment in the former suit did not necessarily determine the matter in the latter, and was no bar.

On error from Special Term to reverse a judgment rendered for the plaintiff below. The case appears fully in the opinion.

*George Hoadly and Mackoy*, for plaintiff in error.

*King, Thompson & Avery*, contra.

HAGANS, J. (TAFT, J. not sitting.) In 1856, Sargent subscribed for five shares, \$500, of stock in the bridge com-



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pany, conditioned as to payment upon the completion of the bridge. The bridge company had then, by statute, 47 Ohio Laws, 269, the power to issue three thousand shares of stock. The bridge was completed in January, 1867, and Sargent was afterward sued on his subscription, recovery had, and the money paid. In the meantime, the company had issued one hundred and eight shares in excess of the original three thousand. In 1856, 55 Ohio Laws, 173, and 1861, 58 Ohio Laws, 160, by acts of the legislature of Ohio, concurrent with the legislature of Kentucky, the company issued "preferred stock," entitled to a dividend of fifteen per cent. before the original stock would receive any dividend, and also issued ordinary stock. When Sargent paid the judgment for his subscription and demanded his stock, the company tendered him five shares of this new issue of ordinary stock, the old having all been issued, which he refused to receive, and brought this suit to recover the amount he had paid.

Sargent claims that the company should have given him preferred stock if any, and that inasmuch as the company had disabled itself from giving him the stock for which he had subscribed, he was not bound to take any other, and was entitled to recover as upon a failure of consideration. *Moses v. McFarlan*, 2 Burr, 1012; *Keys v. Harwood*, 2 Man. G. & S. 905. The acts of 1858 and 1861 referred to, without calling special attention to them, seem to us to be unconstitutional, under article 13, section 1, of the constitution of Ohio, though it seems their provisions were accepted by the stockholders. *Atkinson v. W. & C. R. R. Co.*, 15 Ohio St. 21.

This legislation was evidently regarded as unconstitutional, for in 1865, S. & S. 200, the legislature of Ohio passed a general act authorizing any bridge company heretofore incorporated to bridge the Ohio river, to increase its stock to two million dollars by the vote of a majority of the stockholders, and "to make such increased stock preferred stock," providing for dividends of fifteen per cent

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thereon before the payment of any dividends on the non-preferred stock. The provisions of this act were accepted by a majority vote of the stockholders, but without Sargent's assent, for he was not a stockholder, and was excluded from voting by the statute, nor did he assent to the acceptance of the previous acts. This act of 1865 cured, it is claimed, the previous invalid legislation, and made the non-preferred stock, as well as the preferred issued under the acts of 1858 and 1861, valid; or that, at least, the company, under the act of 1865, had the right to issue non-preferred as well as preferred stock. At all events, the company so construed the act, and issued a large amount of ordinary as well as preferred stock, and it was this ordinary stock which the company tendered to the defendant in error and he refused to take. But a careful reading of the act does not satisfy us that either of these constructions are authorized. The power to make the increase of stock preferred stock does not include the power to issue partly preferred and partly non-preferred stock. The fact was, therefore, that at the time of the demand and tender the company had no old stock, and could not comply with the demand made by the defendant in error. By the issue of the preferred stock, which was equivalent to a first mortgage on the company's earnings, the common or old stock was made of comparatively small value. It is not necessary to discuss the question whether Sargent would have been bound to take the old stock if the company had any to give him.

But it is said that, at most, Sargent is entitled to recover only the market value of the old stock at the time of the demand, which the testimony shows was twenty per cent. of its par value. But the company has no old stock. Besides, the testimony clearly shows that the company had disabled itself from performing its part of the contract, without his assent, and ought not be allowed to take advantage of its own wrong. It seems, therefore, to us a case for a recovery as on a failure of consideration.

But it is finally urged that the record of the suit wherein a recovery was had against Sargent for the subscription price of the stock, precludes a recovery here; that the whole matter is *res adjudicata*, and that this is substantially an attempt to prosecute a writ of error to the judgment in that case. It is said that if Sargent knew of the claim upon which he seeks a judgment here at the time of the litigation in that suit, and did not plead it, he has waived it, and if he did not know it he must bring his action for a new trial. Code, sec. 301; 2 S. & C. 1033; *Reynolds v. Stansbury*, 20 Ohio, 344.

But we are not impressed with the soundness of that suggestion in looking into the record of that case. Sargent might well suppose, *ex æquo et bono*, that the company would issue preferred stock to him, even though he might have known of the overissue of the old stock. And when he had paid the subscription, and his demand was made and not complied with, the parties stood upon that which occurred after the judgment, and upon the new relations thus created. Besides, the actual point at bar was not raised in that case, and not necessarily tried and determined, and this must have been the case to make that judgment conclusive. De Gray, C. J., so laid down the law in the *Duchess of Kingston's case*, 20 How. St. Trials, 538, and our Supreme Court has adopted the same rule in *Love v. Truman*, 10 Ohio St. 45. Says Lord De Gray in the case above cited, "Neither the judgment of a concurrent nor exclusive jurisdiction is evidence of any matter which came collaterally into question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." But, as we have seen, this action is founded upon what occurred after judgment, and could not be a reason for a new trial in that case. The propriety and validity of that judgment is not drawn in question, and, indeed, could not be in this proceeding, but the defendant in error in this case is bound to abide by it.

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We do not see how the plaintiff in error is helped by the fact that the legislature of Kentucky is authorized specially to legislate amendments to the charter of the bridge company, in reference to the preferred and ordinary stock, which was claimed to be followed by the legislature in Ohio. The bridge company can not afford to admit that either State separately can alter or amend its charter or powers. Besides, the acceptance by the stockholders of the act of the Ohio legislature of 1865 precludes the company from denying the jurisdiction of the constitution and laws of Ohio as to its corporate powers.

Judgment below for the defendant in error will be affirmed.

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AARON VAN CAMP v. HENRY O. GILBERT.

Suit brought on receipt given by V. to G. for money to be invested in stocks, and "to manage the same as my own," with V.'s knowledge. G. invested the money, with an equal amount of his own, in a "pool," where nearly the whole was lost, and on a settlement with their brokers an equal dividend was paid to each, accepted, and no exception taken by V. at the time.

*Held*, V. could not render G. liable for the money advanced

This case was tried on submission to the court at Special Term, when the issues were found for the defendant. A motion for a new trial was made, and the case on the motion reserved to General Term.

The action was brought to recover a large sum of money, which was alleged as due from the defendant to the plaintiff, on a transaction which is explained by the following writing:

"NEW YORK, November 3, 1864.

"Received of Dr. A. Van Camp twenty thousand dollars, to be invested in Cleveland and Pittsburg Railroad stock for his benefit. The above amount of money I have left

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with Messrs. Mills, Knickerbocker & Co., where the stock is to be purchased and sold, which purchase and sale I am to manage the same as I do my own.

“Signed,

H. O. GILBERT.”

It was alleged in the petition that the defendant did not, nor has he ever complied with his agreement, but, on the contrary, has neglected to do so, and is now indebted to the plaintiff in the sum he received from him.

The defendant answered, denying all indebtedness, and moreover averred that the money paid to him by the plaintiff was deposited with Mills, Knickerbocker & Co., stock brokers in New York, for the purpose stated in the receipt, who purchased and resold from time to time the stock described, with the knowledge and consent of the plaintiff, who was fully aware of the facts. Afterward, in May, 1865, the brokers referred to rendered a detailed statement of their purchases and sales to the plaintiff and defendant, which was a just and true account of their dealings with the parties, and on that day all moneys due to both plaintiff and defendant were paid to them by the said brokers, to the ascertained amount of \$1,273.25 each, this payment closing the whole transaction. That no exception was taken to the account by the plaintiff, and from that time until the bringing of this suit the defendant did not know that the settlement was questioned or excepted to by the plaintiff. This is averred to have been the only transaction between the plaintiff and defendant.

*I. J. Miller*, for plaintiff.

*C. D. Coffin*, contra.

STORER, J. We are asked to grant a new trial on the ground of “newly discovered evidence,” and because the finding of the court below for the defendant was not sustained by the evidence and was contrary to law.

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A brief history of the case, as we glean it from the testimony in the record, is that the New York brokers referred to held a "pool," so called in Wall street parlance, in which large sums had been and were to be invested for the purchase and sale of Cleveland and Pittsburg Railroad stock, which at one time represented between three and four hundred thousand dollars. In this investment a number of persons engaged, residents not only of New York, but of Cincinnati and Chicago, of all which the plaintiff seems to have been well advised, and was willing to risk his money in the adventure; this adventure being the purchase of the stock already described, and its resale from time to time at the option of the contributors to the fund invested. A large sum was at hazard, and, as usual in such transactions, the financial thermometer was closely watched, to take every advantage of every rise or fall in the market to purchase and sell with profit. The plaintiff knew, it is evident, how the affair was being conducted, and trusted, with all who held shares in the "pool," to future good fortune, and all were alike deceived in the result. On a detailed statement, which the evidence assures us was accurately made and furnished to both plaintiff and defendant, it was ascertained there was due each of them \$1,273.25, which was paid on May 4, 1865, and the following receipt signed by the parties:

"The above account has been examined and adjusted and is found correct, and is hereby settled by the payment to A. Van Camp of \$1,273.25, and the transfer to the general account on Mills, Currie & Co.'s books to H. O. Gilbert of \$1,273.25."

This memorandum was signed by both the plaintiff and defendant, without any protest or complaint, so far as the evidence discloses their conduct at the time. This was in 1865, and no demand was made of any further sum, on account of error or mistake in the settlement, until this action was brought in June, 1869. This singular delay

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has not been explained, and during the whole period the defendant has been within the reach of process in New York and Cincinnati.

There is no question of law presented in the case to be passed upon. The determination of the whole controversy depends entirely upon the facts proved, and, after a consideration of the evidence submitted to us, we find no difficulty in arriving at the same conclusion with the judge at Special Term. We are satisfied the preponderance of testimony can lead to no other conclusion. We can not shut our eyes to the fact that he, who was bound by his contract with Van Camp "to manage purchases and sales of the stock in the same manner he did his own," not only did invest in the "pool" the same amount of his own money as of the plaintiff's, but has also sustained a similar loss, and been content, in adjusting accounts with the brokers, to receive the same amount that was paid the plaintiff. We are all of opinion that the plaintiff has no right of action against the defendant, and that the motion for a new trial be overruled and judgment entered for defendant.

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N. HARRIS v. THE AETNA INSURANCE COMPANY.

A policy insures a person against loss or damage by fire, to the amount of \$5,000, for the term of one year, on his merchandise, hazardous or not hazardous, and on his machinery, tools, and fixtures, contained in the five-story brick building occupied by him as a tobacco factory and warehouse, Nos. 19 and 21, situated on the west side of Hammond street, between Third and Fourth streets, in Cincinnati; adding that the premises were heated by a furnace in the cellar, and connected with the building by wooden bridges from the upper story; and that the premises were occupied as a tobacco factory.

*Held*, that parol evidence was admissible to show that a room, connected by

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wooden bridges with the main building and used as part of the tobacco factory, was included in the premises described.

*Cox, Burnett & Follett and Geo. E. Pugh, for plaintiff.*

*Hoadly & Johnson, for defendant.*

Taft, J. This case comes up on a petition in error, and the plaintiff in error was plaintiff below.

The suit was for a loss, under a policy of insurance, upon certain merchandise, machinery, tools, and fixtures. There is no dispute about the loss or the amount of the loss; but the question is, whether the policy included the property lost. It consisted of tobacco, situated in the fifth story of a building on Main street, which was used by the plaintiff in connection with a five-story brick building fronting on Hammond street, the connection being by wooden bridges across an area.

The policy "insured C. W. Roback against loss or damage by fire, to the amount of \$5,000, for the term of one year, on his merchandise, hazardous or not hazardous, and his machinery, tools, and fixtures, contained in the five-story brick building occupied by him as a tobacco factory and warehouse, Nos. 19 and 21, situated on the west side of Hammond street, between Third and Fourth streets, in Cincinnati, Ohio. The above premises heated by a furnace in the cellar and connected with the building by wooden bridges from the upper story. May 30, 1867."

"The above premises are occupied as a tobacco factory. March 12, 1868."

The plaintiff, Harris, has become entitled to the right of Roback under this policy. The Main-street building was burnt, and the tobacco of the insured, which was in the fifth story, was lost.

The answer denies that the defendant insured any property of the plaintiff at any other place than at Nos. 19 and 21, on the west side of Hammond street, and denies any loss of property insured by the defendant.



The plaintiff proposes to prove, and it was admitted that it could be proved, that when the policy of insurance was obtained, the tobacco in the fifth story of the Main street building was shown to the agent of the defendant as part of the subject of insurance, and that a surveyor on behalf of the defendant examined it all, including that in the fifth story of the building on Main street, which was occupied as part of the factory and warehouse by the insured, and that the said fifth story was used entirely and exclusively in connection with the said five-story building as a part of said factory and warehouse, and was accessible only by and through its connection with said five-story brick building fronting on Hammond street.

The judge, at Special Term, ruled out the evidence as inconsistent with the written description in the policy, and instructed the jury that the plaintiff was not entitled to recover for the loss; to which the plaintiff excepted.

The question is, whether the merchandise in the fifth story of the Main-street building was covered by the policy under the circumstances, and whether this evidence was competent. First, does the description in the policy necessarily include the tobacco in the fifth story of the Main-street building without the parol testimony to explain the surroundings of the subject of the contract; and, secondly, if not, does it so necessarily exclude this tobacco that no parol testimony can show that it was included? The language can not be changed by parol evidence; but by parol or verbal testimony the jury or the court may be aided in ascertaining in what sense the words were actually used.

It is obvious that this property, in the fifth story of the Main-street building, would not be held to be necessarily included in the description as part of the merchandise, machinery, and tools in the five-story building without the aid of parol proof to explain its connection with it. Nor do we think that the language of the description necessarily *excludes* property in a room opening into or connected with the five-story brick building, as this is shown to have

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been. The consequence is that we think that the evidence was competent. This is one of the cases in which a written contract, which is to be construed in the light of the circumstances appearing in evidence, may be construed even by the jury, under the direction of the court. And it is proper for us, now that the statement of the proof is before us, to go further and say that in our opinion the fifth story of the Main-street building was, by a fair construction of the language of the policy, *included* in the "five-story brick building occupied by him as a tobacco factory and warehouse, Nos. 19 and 21, situated on the west side of Hammond street." Nor is this construction inconsistent with subsequent expression in the description, viz: "The above premises heated by a furnace in the cellar, and connected with the building by wooden bridges from the upper story." The building on Main street had not been mentioned or alluded to in any way, so as to require or even justify our construing the word "building" as referring to the Main-street building. The only building known to the description was "the five-story brick building occupied by the insured as a tobacco factory and warehouse, Nos. 19 and 21," etc. The sentence may not be correct in form, but nevertheless we take the word "building" to refer to the same premises intended in the preceding sentence; and the language must be taken to indicate that the premises were not all within the walls of the building, but that some part of them were connected with it by wooden bridges. There was an evident ellipsis, which might be supplied thus, "Part of the above premises are connected with the main building by wooden bridges;" or, "the above premises are connected by wooden bridges from the upper story of the building." Nor do we think it would be going beyond the authorities in like cases, upon such evidence, to reject the words "with the building," and read it simply, "the above premises are connected by wooden bridges from the upper story."

Upon the whole, we think that a man knowing the facts as they existed at the time to which we have referred, and reading the policy in the light of them, would naturally in-

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clude the tobacco in the fifth story of the Main-street building as part of the insured premises. If such would be the case we do not think it necessary that the plaintiff should be put to the risk of losing his insurance by failing to show a mutual mistake in a suit for a reformation of the contract. If it may be read so as to include the tobacco as it stands, and if the circumstances under which the contract was made require us so to read it, we think they may be shown by parol evidence.

The judgment will be reversed.

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E. O. HURD & Co. v. J. C. FRENCH.

A new trial will be granted on the ground of newly-discovered evidence, where it is not multiplication of evidence to facts already investigated, or addition to other facts of the same general nature.

RESERVED TO GENERAL TERM on motion for a new trial, made by plaintiffs below.

The case is fully contained in the opinion

*Stallo & Kittredge*, for plaintiffs.

*Geo. H. Pendleton and Bradstreet*, contra.

HAGANS, J. This is an action to recover \$5,650 and interest, a claim on for damages for breach of a contract to pay a margin on 565 bales of cotton consigned by the defendant to the plaintiffs.

It appears that the plaintiffs advanced \$75,000 on the shipment, which was its cost; and it was agreed when the advances were made, as the plaintiffs claimed, that if, at any time before the cotton was sold, it should decline two cents a pound, the defendant should pay the amount sued for as a margin, and the plaintiffs should hold it subject to his order. The cotton did decline more than two cents a pound, the defendant failed to make good the margin, and

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the plaintiffs sold the cotton, and a loss on the shipment ensued. The plaintiffs sued out an attachment and levied on other property sufficient to secure the alleged damages. The plaintiffs' case stood on the contract and the breach of it; and without waiting to sell the cotton and suffer the loss they brought this suit.

The statement of the contract by one of the plaintiffs on the trial before the jury was contradicted by the defendant. There were statements by another witness, as well as telegrams and correspondence, all of which tended to corroborate the claims of the respective parties, so that the question of contract or no contract went to the jury upon the weight of the evidence, which was pretty evenly balanced.

Among other items of testimony, it was shown that the defendant gave his deposition in the cause at Nashville, Tenn., which, before the certificate of the officer was attached to it, was destroyed by the defendant as he orally stated on the trial; and neither the defendant nor the attorney for either party, nor the officer who took it, was able to state its contents.

The plaintiffs took the depositions of the attorney of the defendant and of the officer who took the lost deposition of the defendant, and they both stated substantially as mentioned above, and also stated that French was drunk at the time; and also had, at the trial, the letter of their own attorney, in Nashville, who was present when the lost deposition was taken, stating that he knew nothing further about said deposition than that it had been taken, and that he kept no notes of the testimony of French, supposing that the officer had forwarded it to the clerk of this court.

In this state of the testimony the jury brought in a verdict for the defendant, and the plaintiffs moved for a new trial upon several grounds, among others on that of newly-discovered evidence. In support of the motion on this ground they produced the letter alluded to, of their attorney at Nashville, and also the affidavit of one of the plaintiffs, that the first they knew of the destruction of the deposition by French

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was his own statement on the trial, and that they were prevented from taking the testimony of their Nashville attorney by his letter to them, referred to, whereby they were led to believe that their attorney, like the defendant's attorney at Nashville, and the officer who took the deposition, knew nothing of its contents. They also produce the affidavit of their Nashville attorney, who was present when the defendant's deposition was taken, that French's statements (setting them forth in detail), in that deposition, part of which French wrote and then signed it, corroborated the plaintiffs' claim, at which he was surprised, as those statements did not sustain the defendant's position. The affiant excuses himself for not making these statements in his letter to the plaintiff, because he kept no notes of French's testimony and because his recollection is more imperfect than if he had done so, and therefore did not attempt it.

In view of the condition of the evidence before the jury, the newly-discovered testimony of the Nashville attorney becomes highly important, and the party ought to have the benefit of it unless it be merely cumulative, it being otherwise unobjectionable. The rule, as stated in *Waller v. Graves*, 20 Conn. 305, cited by this court in *Patrick v. Merrill & Co.* at a previous term, and also with approval in *Gandolfo v. The State*, 11 Ohio St. 119, leaves no doubt in our minds that this testimony is within it. "The evidence, newly discovered, brings to light new and independent truth of a different character, although it tends to prove the same ground of claim before insisted on." It is not multiplication of evidence to facts already investigated, or addition to other facts of the same general nature.

We think the legitimate effect of such evidence will be to require a different verdict, *Ludlow's heirs v. Park*, 4 Ohio, 5; or rather, if received, the most obvious justice, and if rejected, the most palpable injustice, will be done. *Barker v. French*, 18 Vt. 360.

Motion for a new trial will be granted, and cause remanded.

ANDREW ERKENBRECHER v. D. K. ESTE, THE CITY OF CINCINNATI, ET AL.

Where it is apparent that the injury to the plaintiff's rights had all been done by the acts of others than the defendants before suit, an injunction will not lie to restrain them from acts which will work no injury.

An alleged injury to the bare right of navigating the basin of a canal, which is doubtful, and which has been rendered impossible or of no value by the acts of others than the defendants, is *damnum absque injuria*, and the remedy by injunction unwarranted—the injury which the party apprehends must be real.

Where this alleged right has been lost by non-user or lapse of time, an action by injunction to restrain apprehended injury thereto can not be maintained.

RESERVED TO SPECIAL TERM on the pleadings, demurrers, and motions to strike out, which are set out fully in the statement.

*C. D. Coffin and McGuffey, Morrill & Strunk*, for plaintiff.

*Walker, City Solicitor, and Matthews & Ramsey*, for defendants.

The questions in this cause arise upon the pleadings, which are very voluminous. The petition alleges that before July 5, 1831, the Bank of the United States was the owner in fee of a large tract of land, and granted to the State of Ohio, for the use of the canal fund, a lot of land on the east side of plaintiff's lot; that on that day the bank conveyed to Clark Williams, in fee, the lot now owned by plaintiff, described as follows: "All that lot of land in the city of Cincinnati, part of out-lot No. 3, the northeast

corner of Broadway and Eighth streets, fronting on the north side of Eighth street, two hundred and seventeen and one-half feet and extending back northerly fifty-six feet to the line of an old post and rail fence, \* \* \* bounded south by Eighth street, west by Broadway, north by the line of said old fence, and east by a lot lately conveyed to the State of Ohio for the use of the canal fund, *excepting and reserving* a water-way or race of twelve feet in width along the north side of said lot of land from Broadway to said lot of land granted to the State of Ohio, so as to admit the free passage of water along the whole length of said race or water-way, but over which the grantee in this deed, his heirs or assigns, will have the right of building in a reasonable way, not obstructing, however, in any shape the free passage of the water.

“It is further understood and stipulated with the said Clark Williams, his heirs and assigns, that the said race or water-way, from Broadway west and north, is to remain open for boats, etc., the width from Broadway west, half way to Sycamore street, to be twelve feet, and from thence north to Tenth street the width to be forty feet or upward, and from thence to the canal to be twenty feet wide, the extent of the privilege hereby granted being that the said Clark Williams, his heirs or assigns, may, in common with others, pass boats along said water-way from the canal south and east to Broadway; being part of the same property which was conveyed to the president, directors, and company of the Bank of the United States by deeds from the executors of George N. Hunt and others, dated 1st January, 1829, recorded in book No. 29, page 471, and from the executor of Abijah Hunt, dated 16th February, 1829, recorded in book No. 29, page 470, as will more fully and at large appear, on reference being had thereto, of the records thereof in the county of Hamilton, in the State of Ohio, together with all and singular the improvements, ways, water-courses, rights, privileges, hereditaments, and

appurtenances whatsoever, to the said hereby granted premises belonging, or in any wise appertaining; and the reversions and remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, property, claim and demand whatsoever of the said, the president, directors, and company of the Bank of the United States, in law or equity or otherwise howsoever, of, in, to, or out of the same; to have and to hold the said lot of land, of fifty-six feet wide, by two hundred and seventeen and a half feet long (reserving the water-way as aforesaid), hereditaments, and premises hereby granted, or intended so to be, with the appurtenances, unto the said Clark Williams, his heirs and assigns, to the only proper use, benefit, and behoof of the said Clark Williams, his heirs and assigns forever. And the said president, directors, and company of the Bank of the United States do hereby covenant and agree, to and with the said Clark Williams, party of the second part, his heirs and assigns, that they have done nothing to incumber the premises hereby granted, or to prejudice the title to the same; and that the premises hereby granted, with the appurtenances, unto the said Clark Williams, his heirs and assigns, against them, the said president, directors, and company of the Bank of the United States and all persons claiming by, from, or under them, they will warrant and forever defend by these presents."

The petition further alleges that in September, 1832, the bank made a plat of said water-way, designating a part thereof as a basin, and also of certain lots, streets and alleys on the land between Sycamore and Broadway, and Eighth street and the Miami canal, all of which belonged to the bank prior to and on July 5, 1831, subject to the right, privileges, and easements aforesaid, and thereby dedicated said streets and alleys to public use, and thereby granted to the city of Cincinnati the same, upon condition that they should always be kept in good repair and that



no bridge or ford should ever be made across either of said basins, and also describes so much of said water-way as extends north from a point forty-four feet north of Eighth street to Canal street, as the "Large Basin," and setting forth that it is central between Broadway and Sycamore streets, and extends from Court street to within forty-four feet of Eighth street, the width of sixty feet; that the plat was recorded and the dedication accepted by the city; that the plaintiff owns in fee, and is possessed of the lot described in the deed from the bank to Clark Williams, by mesne conveyance from him with the same descriptions and covenants, with all the rights, privileges, ways, and water-courses thereto appertaining, and also of the said right, privilege, and easement in common with others to have, maintain, keep open and use forever for boats and other water-craft, the said water-way from Broadway, in said city, westward half way to Sycamore street, and from thence north to the Miami canal, as conveyed to Clark Williams, and that by said conveyance and said plat and dedication, the width of said water-way from Broadway west half way to Sycamore street is fixed, and he is entitled to have the same remain at twelve feet, and from the point forty-four feet north of Eighth street to Court street, he is entitled to have the same remain at sixty feet, and from thence to the canal twenty feet, and free and open forever for boats and other water-craft to navigate the same, and that no bridge or ford can ever be made across "the Large Basin," lying between Eighth and Court streets, and that on his lot plaintiff has a large manufactory, and uses a portion of the water which passes along said water-way for power under a contract with the State of Ohio; that aside from the intrinsic value in the rights, privileges, and easement belonging to and vested in him, his heirs and assigns forever, to keep open the basin and water-way from the Miami canal to Broadway, the same are of great value to him in the conduct of his business on said lot.

The plaintiff alleges that the city, in violation of the conditions of the dedication to her, is proceeding and intends to build a bridge across the basin at Ninth street, and that the other defendants claim some right in and control over a large part of said basin, and claim the right to fill it up and reduce its width to twelve feet along the greater portion of its length; and he then alleges that if the defendants are allowed to do so, it will seriously interfere with the supply of water necessary for carrying in plaintiff's business, and cut off from him all manner of navigation and transportation by boats to and from said canal, and destroy his right of navigation, and thereby occasion him irreparable injury. And, therefore, he prays appropriate relief by injunction, and a temporary injunction was allowed as prayed for.

The defendants, Este and others, except the city, admit the deed to Clark Williams and to the State of Ohio, and the grant to Williams of the easement in the said water-way, but allege that the grant of said easement is contained in the same deed that conveys the said lot, and while they admit the covenants against incumbrances and special warranty in the deed from the bank to Williams, they allege that the words, "the premises hereby granted." therein, refer to the land conveyed, and not to the stipulation concerning the said race or water-way.

The defendants admit the title and possession of plaintiff to the Clark Williams lot and the plat and dedication referred to, but they aver that the basin was not thereby dedicated to public use, having been previously, viz: January 24, 1831, conveyed by the bank to the State of Ohio to be used as part of the canal, and they deny that the plaintiff is in possession of, or is the owner in fee of, any right, privilege, or easement, in common with others, or in any other manner to maintain, keep open or use for boats or other water-craft, said water-way; they admit plaintiff is entitled to use a part of the water passing through said

water-way, for the purpose of power, under a lease from the State of Ohio, but deny that if plaintiff has any right to keep it open for the passage of boats from the canal, that the same would be of any value to him in the conduct of his business or otherwise. They allege that the conveyance by the bank to the State of Ohio, January 24, 1831, grants the lot next east of plaintiff's lot, and also the privilege of a race or water-way to the same, to commence on the south side of the canal, north of Court street, half way between Court and Sycamore streets, and to run south parallel to these streets to within fifty feet of Eighth street, and from thence easterly parallel with Eighth street, at the distance of fifty feet therefrom, to the corner of the said lot, said race to be excavated, walled, and bridged suitably, at the expense of the State, from the canal along said race to the elbow near Eighth street, twenty feet wide to the south side of Court street, forty feet wide to within fifty feet of Eighth street, and from thence east six feet wide; that this deed merely concedes a passage-way for water forever to be used on said lot.

The defendants also state that plaintiff holds a perpetual lease of water power from the State of Ohio, to be drawn from the race or basin connected with the canal, subject, however, to the right of the State to draw the water out for repairs, or to use the whole of the water if necessary for the purposes of navigating the canal; that the basin was excavated and walled by the State, to the width of — feet, and the race or water-way twelve feet in width; that the basin was used to some extent by boats for navigation, but the race or water-way from the basin to Broadway never was so used, because too narrow and arched over so that only water could pass; that the basin never came into general use for navigation, and that for that purpose it was a failure and of no value; that from its construction there was little or no current, and the sediment accumulated therein, and it became partly filled up;

that it was seldom or never thoroughly cleaned out, so that at last it was only cleaned out so as to furnish a narrow passage-way in the middle of it for the passage of water, and the earth therefrom deposited on either side thereof forming permanent embankments along its entire length; that in 1851 the State constructed a heavy stone bridge at Court street, across said race-way, leading from the canal to the basin, the arch of which was so low as to form a permanent obstruction to the navigation, though loaded boats could, and a few did, pass under it to the basin, but when unloaded could not pass out again, unless loaded; that because said basin was not needed and by reason of the filling up of the same and of the existence of said bridge, the navigation of the basin has ceased for many years, and for ten years or more the State of Ohio has abandoned it, and has only kept the race-way open along the middle of it, for the passage of water; that on 18th March 1860, Samuel Jandon and others, assignees of the title of the Bank of the United States, leased the southeast one-fourth of the basin to one Rosebrough, who entered into possession and erected a cooper-shop thereon, and the city of Cincinnati claiming the same as dedicated to the public use as a street, threatened to remove his building, when he filed a bill in the Court of Common Pleas to restrain it and to quiet his title, and a decree was rendered in his favor; that in April, 1865, Joseph Rechter, assignee of Rosebrough, commenced his action in this court against Kent Jarvis and others, lessees of the State of Ohio, and the acting member of the Board of Public Works, the State becoming a party by its own consent, George Peabody having succeeded to the rights of the lessees and the Bank of the United States, in which a final judgment by consent was entered, decreeing that Peabody's title be quieted to the whole basin, subject to the easement of a mill-race or water-way in the center thereof, twelve feet wide, and said Peabody

may, among other things, extend Ninth street across the same, to lower the bridge at Court street, and the State of Ohio was to have the right of access to clean out said water-way; that the defendants, whose lots abut on said basin, are grantees of Peabody, subject to the terms of said decree, which they are ready and willing to comply with, but are restrained from doing by this injunction; that when said race-way is constructed according to said decree, the water will be delivered as freely and fully to plaintiff's lot as before the basin was filled up, and no injury will ensue to the plaintiff so far as his supply of water is concerned; that the basin in its present condition is a public nuisance, which will be removed by obedience to said decree.

The defendants charge that plaintiff never used said basin for navigation in any way, nor did his grantors; and that they all acquiesced in the abandonment of the basin by the State for navigation, and plaintiff's right of navigation has thereby been lost by adverse use and lapse of time, as against defendants, who bought for valuable consideration and without notice.

The city answers that it has possession and charge of the streets on the east and west side of the basin, known as East and West Cheapside, and desires to extend Ninth street across the basin to facilitate the public convenience, and entered upon the work of extension, and intends to lower the bridge at Court street in accordance with said decree, and adopts the answer of its co-defendants in all other respects.

1. The plaintiff moves to strike from the answer of Este and others so much thereof as avers that the words "the premises hereby granted," in the covenants in the deed to Williams, refer to the land conveyed, and not to the easement of navigation claimed by plaintiff in the basin, on the ground that it is a legal conclusion and not a fact.

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2. For the same reason, to strike out the denial that the use of the race-way by Williams, his heirs and assigns, in common with others, was or is an appurtenant to the land conveyed.

1. The plaintiff demurs, generally, also, to the allegation that the easement of navigation would not be of any value to plaintiff in the conduct of his business on his lot or otherwise.

2. To so much of the answer as sets forth the deed from the bank to the State of Ohio, January 24, 1831, and the lease from the State to Williams and others, May 16, 1831, and to so much as avers by whom and how said basin was to be excavated and walled.

3. And to so much as states that said race from the south end of said basin to Broadway never was used for navigation, it being too narrow to admit of it, being built over, arched, and permanently obstructed, except for the passage of water, ever since it was made.

4. To the allegation that avers that there was so little current in the basin, owing to its construction, the sediment accumulated rapidly and partially filled up and obstructed the same.

5. To the allegations which set forth the legal proceedings which culminated in the consent decree mentioned.

6. To the allegations that when the race-way is constructed according to said decree, the water will pass and be delivered as freely and fully to plaintiff's lot as before the basin was filled up.

7. To the allegation that the basin is a public nuisance, and will be abated by the proposed construction of said race-way.

8. To all allegations of non-user of said basin by plaintiff and his grantors for the purposes of navigation.

The motions and demurrers were reserved to this court,

HAGANS, J. The pleadings have been substantially stated, so that the points presented by the various motions and demurrers might the more readily be seen.

We do not understand that there is really anything involved in this litigation but the bare right of navigation of the basin referred to. There seems to be no complaint in other respects. Upon the admissions of the demurrers, there arises very many questions. Among them these:

Had not the Bank of the United States previously conveyed to the State of Ohio the basin as a water-way and adjunct to the navigation of the canal, so that this subsequent conveyance to Williams passed nothing to him in respect of that navigation different from the enjoyment thereof by the public at large?

Is the right of the plaintiff to navigate the basin in common with other abutting property owners, if any exist, appurtenant to his lot as an easement, and if so, has it been lost by non-user and lapse of time?

And, finally, is the plaintiff, upon the pleadings as before us, likely to sustain any irreparable injury by the proposed action of the defendants, which furnishes sufficient ground for the equitable interference of the court by way of injunction?

If this last question be answered in the negative, there would seem to be no necessity of inquiring any further.

By the admissions of the demurrers, it is apparent that no injury will accrue to the plaintiff's alleged right to navigate the basin, by reason of anything which it is sought to enjoin. The exercise of the right of navigation had long before been effectually prevented by the acts of others, for which neither the defendants nor their grantors are responsible.

It is very clear to us that, so far as the city is concerned, the plaintiff has an adequate remedy in damages in a civil action, if he have a right to maintain it, for a breach of an

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alleged contract at the time of the plat and dedication made by the Bank of the United States, or for a trespass, and it would seem that the damages, in either case, would be at most but nominal.

And we see no good reason why the same thing may not be said of the other defendants. By the pleadings, it appears that the substantial injury had all been done to the plaintiff, if any, before the action was brought. And if it be true, as we think it is, that the damages which the plaintiff would sustain, would only be nominal, that alone would not furnish sufficient ground for equitable interference. The injury which the party apprehends should be real. *Watrous v. Rogers*, 16 Texas, 410; *Campbell v. Scott*, 11 Sim. 39; *McCord, etc. v. Iker*, 12 Ohio, 387; Angell on Water-courses, sec. 444, p. 620; *Hatght v. Morris Aqueduct*, 4 Wash. C. C. 601.

Besides, we are not satisfied that the plaintiff's right is clearly defined and established. If there be such a right as the plaintiff claims, the case made by the plaintiff seems to us to be *damnum absque injuria*. In either case, we think that the remedy of injunction is unwarranted.

This view of this case renders it unnecessary to discuss the cases cited by the plaintiff's counsel at the argument.

The motion to strike out and the demurrers will be overruled.



OTIS B. LITTLE, Plaintiff in Error, v. T. G. QUINN & Co.,  
Defendants in Error.

L. C. & Co. and Q. & Co. exchanged notes for the accommodation of the former, who negotiated in bank Q. & Co.'s note. When due it was renewed. Before its maturity, L. C. & Co. dissolved partnership, L. retiring, and the remaining members of the firm formed a new partnership under the style of C. & Bro., and assumed the liabilities of L. C. & Co. When the renewed note fell due, it was again partly renewed by C. & Bro.'s note, indorsed by Q. & Co., and the balance paid in cash by C. & Bro., all without L.'s assent. This last note was protested for non-payment, C. & Bro. having become insolvent. Through all these transactions, Q. & Co. retained the original note of L. C. & Co. as security. In a suit by Q. & Co. against L. C. & Co. upon their original note under section 500 of the Code (2 S. & C. 1095):

*Held*, That L., the retiring partner, can not claim that the change of securities in the hands of the bank operates as a release of him, on the ground of a payment, or of an extension without his consent, of the original debt in the hands of Q. & Co. sued on.

*Held*, That such a change of securities did not suspend the right of action, which Q. & Co. have on the original debt of L. C. & Co. to them.

ERROR TO GENERAL TERM by Otis B. Little to a judgment rendered against him and others. The case appears fully in the opinion.

*I. J. Miller*, for plaintiffs.

*H. M. Cist and George Hoadly*, for Little.

HAGANS, J. It was claimed that Otis B. Little, William Carson, and Robert Carson, partners as Little, Carson & Co., are indebted to the defendants in error in the sum of \$1,500 and interest upon a promissory note for \$3,000, dated November 1, 1868, payable two months after date, at Kinney & Co.'s bank, to the order of the defendants in error. The note is credited with \$1,500. It is agreed that

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Little, Carson & Co. gave Quinn & Co. this note as a collateral security, so-called in the pleadings, for their accommodation note, dated November 4, 1868, of like tenor and amount, to be used in the business of Little, Carson & Co. It was in fact an exchange of notes for their accommodation, both being original notes. The note which Little, Carson & Co. got, they discounted in bank, and when it became due, they neglected to pay it, and did not pay their own note which the defendants in error held. The defendants in error, at the request of Little, Carson & Co., and to save their own credit, made their promissory note for \$1,000 payable to Little, Carson & Co., and also indorsed Little, Carson & Co.'s note for \$2,000, with which they raised the money to take up Quinn & Co.'s note which they had discounted, Quinn & Co. still holding by agreement the \$3,000 note of Little, Carson & Co., which they had obtained as collateral security, as they call it, for the payment of the newly made notes of \$1,000 and \$2,000 respectively. These two new notes were dated January 6, 1869, and were due in thirty days. Before these notes became due the firm of Little, Carson & Co. was dissolved, Little going out of the firm, and William and Robert Carson still keeping the business, under the firm name of Carson & Bro., and assuming the partnership liabilities. When the notes last given for \$1,000 and \$2,000 respectively became due, they were not paid, and the defendants in error, at the request of Carson & Bro., indorsed Carson & Bro.'s note for \$1,500, with the proceeds of which and \$1,500 in cash raised by them besides, Carson & Bro. took up the due notes. Thereupon the defendants in error indorsed the note sued on with a credit of \$1,500—the cash raised by Carson & Bro.—and, as they say, held it as security for the payment of the new note for \$1,500 of Carson & Bro., by agreement with them, of all which Little had notice. It appeared that Little made ineffectual efforts to procure the surrender of the note sued on. When this new note for \$1,500 became due it was protested for non-payment, and the holders look to the defendants in

error for payment, "for the reason," the petition alleges, "that Carson & Bro. have become insolvent." And the defendants in error ask judgment against Little, Carson & Co., that they secure the defendants in error from loss in the premises.

The defendants in error, as will be seen, have not paid the \$1,500 note, but have brought their action under section 500 of the Code (2 S. & C. 1095); and the judge below rendered judgment in their favor, against Little, Carson & Co., for the balance due accordingly; to which Little excepted and now prosecutes this writ of error.

Ordinarily, the giving a new note in renewal of an old one is equivalent to the payment of the latter, unless the presumption of payment is controlled by evidence of a contrary intent. *Cornwall v. Gould*, 4 Pick. 444; *Huse v. Alexander*, 2 Met. 157; and see *Emley v. Lye*, 15 East, 7, where the authorities are collected. The claim of Little here is, that when Carson & Bro. gave the renewal note for \$1,500 and raised \$1,500 in cash, and so took up the preceding debt of Little, Carson & Co., it operated as a payment of Little, Carson & Co.'s obligation to the defendants in error. No doubt the defendants in error knew that Little had gone out of the firm when they indorsed Carson & Bro.'s note, but we do not think this affects the question.

In the early case of *Horsey v. Heath et al.*, 5 Ohio, 354, the court say, "Though partnerships may be terminated, yet partnership responsibilities continue until all are discharged. The proposition of the respondents would be a great convenience to debtors, as it would put it in their own power, without the consent of creditors, to discharge their obligations by a mere dissolution of the partnership." And further, on p. 357, "When the identity of the debt is ascertained, it is now settled that a new change of the evidence of it will not affect the liability of the real parties in a court of chancery." No new debt is created. Again, the change of the security effected by giving the note of Carson & Bro. in part renewal of the precedent debt, did not stop

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or prevent the defendants in error, for an instant, from beginning such a suit as this upon the note sued on here. They could have brought it at any time, and Little can not complain that there was an extension of time for payment by the creditor of the original liability, for such a complaint is unfounded as against the defendants in error.

Here the original transaction was for the benefit of Little, Carson & Co. The defendants in error were only accommodation indorsers or makers in the subsequent renewals. They held on through them all to the original note of Little, Carson & Co., sued on, according to the original agreement. There was no agreement to postpone the remedy which the defendants in error had upon the original debt as against Little, Carson & Co., and any delay in doing so was in the hope that Carson & Bro. would pay the debt for which Little was liable, and which was for his benefit. If the defendants in error had agreed to delay or postpone their remedy against Carson & Bro., or if it could be claimed that there had been any delay to the prejudice of Little, there might be ground for his defense. Nothing of the sort appears in the testimony. Thus the case seems to be closely assimilated to *Bedford v. Deakin et al.*, 2, Starkie, 178, where Lord Ellenborough held, that where the plaintiff held a bill of exchange of three partners, and after their dissolution and the bankruptcy of one of the partners took the notes of one of them as collateral security, without the knowledge of the other partners and retained the original security in his hands, this did not discharge the other partners. And this was upon the principle that nothing had been done to the prejudice of the other partners; that no remedies had been postponed on the original debt, and the new securities were taken on the express condition that they should not affect the original security he held and had never given up.

Again, it is said that as between the defendants in error and Little, there existed the relation of principal and surety immediately upon the dissolution, and that the defendants in error, who had knowledge of the facts, by indorsing

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the \$1,500 note of Carson & Bro., extended thereby the time of payment of the debt and so released Little. But a sufficient answer to all these arguments may be found in the fact already stated, that no remedy on the note sued on which the defendants in error had was suspended. The case might well be tested by supposing that the defendants in error had raised the money on any other note than Carson & Bro.'s. No remedy in favor of Quinn & Co., against Little, Carson & Co., would thereby have been suspended. As between the parties and the creditor, Little, Carson & Co. were principals and the defendants in error sureties, so we do not see that the doctrine of principal and surety as stated applies in this case. The defendants in error did not take the new note, nor was it in any way substituted for the note sued on; but the creditor of the firm of Little, Carson & Co., with whom the former notes had been negotiated, took the note of the firm of Carson & Bro. The taking of the new note of Carson & Bro. probably operated to release Little as between him and the creditor, but that is not the question here.

The judgment will be affirmed.

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PAUL J. SORG and WM. H. BUSKER, Partners as Sorg & Busker, v. GEORGE THORNTON ET AL.

T., P. & Co. had been in the habit of obtaining loans from the plaintiffs. On the admission of another partner the business of the firm was changed, and also the firm name to P. & Co., T. being still a partner. T. obtained a loan from plaintiffs, giving a note in the old firm name of T., P. & Co., and converted it to his own use, no knowledge of the change in the firm name being brought home to the plaintiffs, or of T.'s fraud to the defendants.

*Held*, that the plaintiffs might recover the amount loaned T. from the other partners.

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Sorg & Busker v. Thornton et al.

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CASE RESERVED FROM SPECIAL TERM upon the evidence certified by the judge.

The petition claims the defendants to be indebted to the plaintiffs for money loaned to them as partners in distilling whisky, at Hamilton, Ohio. Thornton, Dascher, and Potter composed the firm.

Dascher answers that he owes the plaintiffs nothing, and denies all indebtedness. Potter denies generally all the allegations in the petition, and insists that if any money was loaned by the plaintiffs it was for the individual benefit of the defendant who borrowed it, for which the copartners are not responsible.

The case was heard on submission, and all the questions arising upon the evidence were reserved to be heard in General Term.

It was in proof that Thornton and Potter, two of the defendants, had been partners in the tobacco business in Cincinnati, prior to February, 1869, and as such had dealings with the plaintiffs, being known to them as partners, under the firm name of Thornton, Potter & Co.

This copartnership was dissolved in the latter part of February, when a new firm was formed, composed of Thornton, Potter & Dascher, for the manufacture of whisky, at Hamilton, where the last-named defendant resided. They had commenced business as partners, and on the 12th day of May, 1869, Thornton called on the plaintiffs and represented to them that the new firm had on hand one hundred barrels of whisky ready for market, but needed \$1,500 to purchase the necessary stamps required by the internal revenue law; that they were short of cash, though their new partner, Dascher, was worth \$60,000, which was invested in real estate, and requested the plaintiffs to loan to the firm the amount.

After consultation with the parties, the plaintiffs having intimated that it would be inconvenient for them to advance the money, it was proposed by Thornton that they should

make their note for the amount, payable to the defendants in sixty days, and he would execute at the same time the note of the defendants for the same sum and payable at the same time. Relying upon the statements of Thornton, and believing the transaction to be *bona fide* on his part, and trusting to all the defendants for the security of the loan, the plaintiffs then made their note to the defendants, and received in return from Thornton a note of similar tenor, in the name of Thornton, Potter & Co.

Having possession of the note thus made, Thornton procured it to be discounted and received the proceeds, which it appears he did not apply to the benefit of his copartners, but having appropriated to his own use, shortly after left the city, to which he has not since returned. Potter and Dascher both deny that they authorized any loan to be made or that it was required for the purposes of the firm, no credit for the amount being found upon the books of the firm. They further state the partnership name agreed upon and published to represent the new firm was that of Potter & Co.; but other witnesses, who knew a partnership had existed in Cincinnati, under the name of Thornton, Potter & Co., that it had been dissolved and a new firm formed consisting of these defendants, who were engaged in distilling whisky, testified they had not heard or did not know the firm name had been changed.

STORER, J. It is evident from the testimony, as well as the admission of counsel in argument, that Thornton committed a fraud in obtaining the loan, but there is no pretense of any complicity on the part of the other defendants with him in the act. It is claimed, however, there could have been no recovery upon the note given to plaintiffs by Thornton, Potter & Co., as the partnership name of the defendants was Potter & Co., and by that designation alone a liability against the defendants could be created.

If this assumption is admitted it does not follow, we think, that this action is not well brought, for the plaintiffs declare

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Sorg & Busker v. Thornton et al.

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for money loaned and offer the note which was discounted by Thornton, he receiving the proceeds, only as evidence of the transaction.

We think it is immaterial whether the plaintiffs gave a check for the money borrowed, or furnished the means by which it was realized; the note was equivalent to a loan—it produced the same result the borrower desired to accomplish when the plaintiffs were asked to extend the accommodation. And such would seem to be the opinion of our Supreme Court in the case of *Gano & Thoms v. Samuels*, 14 Ohio, 592, where it was held that “an acting partner, for the benefit of his firm, and in order to raise money, might use the name of the firm by accepting a bill of exchange to be exchanged for the acceptance of another firm.” If, however, a loan or its equivalent is proved to have been made to, or received by, one partner on the faith that all the partners are thereby benefited, and a note is given by the individual partner in a name which the other members have not adopted, the liability of all the members ought not to be denied if the note itself should be valueless.

The note could not extinguish the liability. It must be admitted that every member of a copartnership is authorized, by the relation he has entered into with the other members of his firm, to borrow money as one of the incidents of the copartnership itself, and this, too, if the partners were restricted by the partnership articles from borrowing money, if this was not known to the lenders at the time the loan was made.

The whole question is elaborately discussed, and the law announced in *Winship et al. v. Bank of the United States*, 5 Peters, 529, “that the *status* of copartnership itself holds out to the world the right of one partner to bind the firm; and it is on the general principle of commercial law, and not on the copartnership articles, that the other partners are liable.” If, then, we assume the representations made by Thornton to be false, they must nevertheless bind his copartners. Story on Contracts, sec. 224; Lindley on Partnership, 250; *Rapp v. Latham*, 2 B. & A. 795.



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The case before us resolves itself into these questions:

*First.* Did the plaintiffs loan the money, sought now to be recovered, to Thornton for the benefit and on the credit of all the defendants who are admitted to have been partners in business, and was it within the scope of his authority to do so?

*Second.* Did the plaintiffs advance the money to Thornton on the supposition that the proper firm name was signed to the note he gave, or did they not rather rely on the credit of all the partners whose names they knew, one of whom was represented by Thornton to have put \$60,000 of capital in the new firm?

*Third.* Were there any facts connected with the transaction between the plaintiffs and Thornton that should have put them on their guard as to the truth or falsity of his representations?

*Fourth.* If Thornton, as is admitted, committed a gross fraud, who shall suffer for his acts, the defendants, his copartners who held him out to the world as their agent, to act for the interest of them all, and in every proper case to create a firm liability, or the plaintiffs, who, confiding in his representations, however false they were, advanced the money sought to be recovered?

On the whole case we feel compelled to resolve each proposition in favor of the plaintiffs, and render judgment against the defendants for the amount demanded.

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A. W. HENTZ v. R. C. WARD ET AL.

M., the owner of the equity of redemption in lands, died before suit brought in the Common Pleas to foreclose the mortgage thereon. On the sheriff's return it nevertheless appeared that M. was "served at residence." After decree for sale, the plaintiff therein suggested M.'s death "after suit brought" on the record, and A. being sole heir at law to M., the action was revived as against him, and he answered by *guardian ad.litem*, setting up his interest as heir. Subsequently a new decree for foreclosure

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and sale was made, sale had and confirmed. On suit by A., against the purchaser, to compel an allowance of redemption:

*Held*, that as the record showed that M. was served with process, the Court of Common Pleas *prima facie* had jurisdiction, and as the proceedings appeared to be regular on their face, its judgment could not be collaterally impeached, and the purchaser's title disturbed.

CASE RESERVED TO GENERAL TERM on the testimony, which appears fully in the opinion.

*Peck and McDougall*, for plaintiff.

*I. J. Miller and Caldwell, Coppock & Caldwell*, contra.

HAGANS, J. This is a suit to compel the defendants to allow the plaintiff to redeem certain property sold under proceedings in foreclosure.

It appears from the testimony that Frederick Hentz mortgaged lots 179, 180, and 181, in Ernst subdivision, to A. H. Ernst, to secure a balance of purchase-money. Shortly afterward Ernst assigned the mortgage and notes to Edward Woodruff. Frederick Hentz afterward conveyed his equity of redemption to his unmarried daughter, Mary L. Hentz, who died in 1861 intestate, leaving the plaintiff, then a minor, her only heir at law. In January, 1862, Woodruff, being ignorant of the death of Mary L. Hentz, brought suit to foreclose the mortgage in the Court of Common Pleas, making Frederick Hentz and Mary L. Hentz parties defendant. The sheriff returned both defendants served with a copy of summons at residence. In February, 1862, a decree for sale was entered in the usual form, that unless F. Hentz, or some of the defendants for him, pay, etc. In May, 1862, order of sale was issued. The property was sold to John Bates, who refused to perfect the purchase. On the 5th September, 1862, plaintiff volunteered in the United States service. On September 20, 1862, plaintiff suggested on the record the death of Mary L. Hentz *since the commencement of the action*, leaving the plaintiff, nineteen years old, her only heir at law, and moved the court to revive the action against him. In October, 1862, the conditional order of

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revivor was returned, by the sheriff, served at residence. In November, 1862, a guardian *ad litem* for the plaintiff was appointed, who filed an answer, setting up that plaintiff had an interest in the property as heir at law of his sister. Additional parties were made and a second decree of foreclosure was entered; sale was had to the defendants and confirmed, March 9, 1864. In the meantime Frederick Hentz died, and the plaintiff, as his administrator, in October, 1867, brought a suit in the Court of Common Pleas against Edward Woodruff, to vacate the judgment above described, setting forth in his petition the fact of the errors in the record thereof, which, after various demurrers and amendments, was finally dismissed at his cost, in January, 1869.

It is claimed by the plaintiff:

*First.* That Mary L. Hentz, once the owner of the equity of redemption, being dead when the foreclosure suit was brought, the decree is void as against him, and that the order of revivor does not help a void decree; and, .

*Second.* That plaintiff was in the army when the property was sold, and the sale was therefore void under the then statutes of Ohio on that subject.

As to this last claim, we think the statutes, if they have any application in this case, were passed merely for the protection of soldiers, which protection they might claim at the hands of the court at the time of the litigation, or otherwise be held to have waived it.

The record is neither silent on the subject of service, nor does it show on its face that the defendant in that action was not served. It positively states that Mary L. Hentz, who appeared to be the owner of the equity of redemption, was served with summons. And the only question that presents itself in the case is, whether the judgment founded on such a state of facts as appears in this case is void or voidable. If the former, then the plaintiff would be clearly entitled to the relief he seeks, provided the subsequent action, in the Court of Common Pleas, to vacate the judgment, is

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not a bar to this suit. If the judgment is voidable merely, then the party must seek his remedy elsewhere.

We do not see how the return of the sheriff to the summons against Mary L. Hentz can be impeached in a collateral action like this. *Mueller, etc. v. Bates*, 2 Dis. 318. This is not an action founded on the decree or judgment of foreclosure; if it were that might be done. *Starbuck v. Murray*, 5 Wend. 148; *Bissell v. Briggs*, 9 Mass. 462.

In the early case of *Denneson v. Allen*, 4 Ohio, 496, it was held that a subsequent purchaser from a mortgagor can not be let in to redeem against a purchaser under a judgment on *scire facias* on the elder mortgage, though not made a party to the proceeding. It was said by the Supreme Court that the legislature intended, in the provisions relating to *scire facias*, that interests not paramount to that of the mortgagee, such as interests subsequently derived from the mortgagor, should be concluded by the judgment, and that any other construction would work a fraud on the purchaser, so that the plaintiff, under that practice, need not have been made a party at all. This of course proceeds on the idea that the court had jurisdiction. The case of *Adams v. Jeffries*, 12 Ohio, 253, was a proceeding by an administrator to sell lands, where the record showed *affirmatively* that the heirs were not made parties, and it was held that the proceeding was void on the ground that the court had no jurisdiction. So also the case of *Moore v. Starks*, 1 Ohio St. 369, in which Judge Caldwell delivered the opinion of the majority of the court, Judge Thurman dissenting. That case turned on the validity of a proceeding of foreclosure of a mortgage where the record showed *affirmatively* that minor heirs were not served with process. It was held that a decree purporting to determine their rights was void, even though a guardian *ad litem* had been appointed and had answered; and it was stated that if the record had been silent on the subject of service of process it would be presumed, in favor of the judgment, that the court had jurisdiction, though that presumption might be rebutted by proof that the parties had not

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been served, and that then the record becomes a nullity and could be collaterally impeached; and it was further held that the proceeding in foreclosure was both a proceeding *in personam* and *in rem*, because the mortgagor is liable for any deficit, thus substantially questioning the previous decision in *Hamilton v. Jeffries*, 18 Ohio, 429, where the Supreme Court, speaking of such proceedings said, they "are not technically, it is true, but substantially proceedings *in rem*." It would seem to be settled now that it is a proceeding both *in personam*, so far as the mortgagor is concerned certainly, and all others claiming an interest in the thing who would be bound by the judgment, and *in rem* so far as the thing itself is concerned.

The obvious distinction between void and voidable judgments was very fully argued and decided by Judge Hitchcock in *Cochran's heirs v. Loring*, 17 Ohio, 409. In the first instance, all acts of the court not having jurisdiction are void; in the second, if the court had jurisdiction the judgment will be good so long as it stands unreversed, and a title under an erroneous judgment will not be disturbed. And it was held, among other things, that though the judgment was erroneous in that no notice was given of the pendency of the attachment levied on the lands in the controversy, and though the defendant, against whom the judgment was rendered, died before the judgment, still it could not be attached collaterally.

Now, in the case at bar, it appears on the face of the record of the foreclosure suit that Mary L. Hentz was duly served with process, though in fact she was then dead; that she died during the pendency of the suit, which was untrue, and that it was revived against the plaintiff, her heir at law, though there was nothing to revive as against the plaintiff. But, on the face of the proceedings, the court had jurisdiction. It appears affirmatively that the plaintiff was served with sufficient notice of the suit, and the subsequent decree was conclusive of his right. The record of the proceedings appears to be regular, and the decree is unreversed. Being

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brought before us collaterally, this record is by no means subject to all the exceptions which might be taken on a direct appeal, or other proceeding to vacate it. The proceeding was a judicial one, carried on under the supervision of a court and received its final sanction. "The general and well-settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, *and it appears on the face of them* that the subject-matter was within the jurisdiction of the court, they are voidable only. The errors and irregularities, if any exist, are to be corrected by some direct proceeding, either before the same court to set them aside," which the plaintiff tried and failed to do, "or in an appellate court." *Tolmee v. Thompson*, 2 Peters, 163. "The purchaser is not bound to look beyond the decree when executed by a conveyance, if the facts necessary to give jurisdiction appear *on the face of the proceedings*, nor to look farther back than the order of the court." *Voorhies v. Bank United States*, 10 Pet. 477. "If the jurisdiction was improvidently exercised, or in a manner not warranted by the evidence before it, it is not to be corrected at the expense of the purchaser, who had a right to rely upon the order of the court as an authority emanating from a competent jurisdiction." *Tolmee v. Thompson, supra*.

Reversal of a judgment does not affect the title of the purchaser. The correction of the error only results in the restitution of the money recovered by an adversary. But in this collateral proceeding the party seeks the land and the fruits of an investment made by an innocent purchaser, invited by judicial proceedings that were regular on their face. We do not think we ought to disturb that title.

We have said nothing of the plaintiff's delay. If it were necessary to consider it, it might have an important bearing on our minds.

This view of the case renders it unnecessary to discuss the other questions made in the case.

Judgment for the defendants.

## RANKIN &amp; Co. v. THE CITY OF CINCINNATI.

The city of Cincinnati contracted with Bearly to erect a school-house for \$81,000, and Bearly made subcontracts with plaintiffs and with others to do parts of the work. The plans of the building were in some respects modified, and considerable extra work, including an extra privy, was done, increasing the cost beyond the original contract price. The contractor failing to pay plaintiffs, they served a notice of the balance due on their claim for work which would have been included within the terms of the original contract. At the time of the service of the notice by the plaintiffs, the city had paid Bearly the entire sum of \$81,000, which was the amount called for by the original contract, but the city nevertheless owed Bearly \$1,377 by reason of the extra work. Several of the defendants filed claims for work done on the same building, but not provided for in the original contract, unless it were under the clause providing that extra work should be stipulated for in writing and signed by the parties:

*Held*, that the formalities required by the contract for extra work might be and were waived, and that the extra work was to be regarded as done under one general contract embracing the entire job, and that the plaintiffs were entitled by priority of notice to establish a priority of lien upon the fund in the hands of the city against those who performed the extra work as well as against those claimants whose work was done within the terms of the original contract.

*Held*, also, that the city clerk's office was the proper place at which to serve the notice, and the clerk the proper agent on whom to serve it, and that the plaintiffs having first presented the statement of their claim at the clerk's office to the clerk, were entitled to be first paid out of the fund.

*Decamp*, for plaintiffs.

*Moore, Conner & Warrington*, for city.

*Mills & Wulsin, Hoadly & Johnson, and Tyler*, for claimants.

Taft, J. This is a contest between subcontractors for a fund due from the city to Bearly for work done for the city in connection with the Franklin-street school-house. The balance of funds in the hands of the city was \$1,377, while the claims of subcontractors amounted to much more.

The first question, relating to priority among the cred-

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itors, turns upon the notice of their respective claims upon the city. The plaintiffs, Rankin & Co., were the first to leave at the office of the clerk of the board of education a statement and notice of their claim. They left their statement and notice at the office on the morning of the 18th of August, 1870. The clerk was himself out of the city, but there was a messenger or officer who kept the office open.

Dunn & Witt deposited their claim in the office at 5 P. M., August 22d.

The clerk returned to the office on the morning of August 22, 1870.

These claims were read to the board of education on the same day, that is, at the meeting in the evening of the 22d of August.

There are none others to compete with these in point of time, but the other parties contest on a different principle, to which we shall soon refer.

As between these parties, we think the plaintiffs are prior in time with the service of their notice. It seems to us that they presented their notice to the right place and to the right person. The notice of the claim of Rankin & Co. must have actually reached the clerk before that of Dunn & Witt, if we are to rely upon the probabilities arising on the evidence, as the clerk returned to the office on the morning of the day in the afternoon of which Dunn & Witt presented their account, the plaintiffs' account having been presented four days before.

The contract itself provides, "That if any of the subcontractors of said work shall, at any time during the progress of said work, give notice to said board that they have not received pay for their estimated portion of said work, according to the terms of their agreement with said Bearly, then in such case *it shall be lawful for the clerk of said board to settle directly with such subcontractors, their receipts for such direct payments to be taken as absolute payment and satisfaction for so much of the contract price of said house.*"

This clause in the contract recognizes the clerk as the



agent of the board for payment of the subcontractors as well as of the principal contractor, and as the medium of communication between them and the board. So far, then, as the question of notice is concerned, we find the plaintiffs first and Dunn & Witt next. The claim of the plaintiffs is for \$8,313.23, and that of Dunn & Witt for \$1,082, so that they absorb the entire balance of \$1,377 in the hands of the city, unless the other subcontractors can show that they are entitled to the fund on some other principle than mere priority in the time of filing their claims; and if the plaintiffs are first entitled they take the whole and leave nothing even for Dunn & Witt. There are other claims like that of the plaintiffs, beside that of Dunn & Witt, but they must be postponed because they were later in the time of presenting their accounts.

It has been suggested that the subcontractors ought all to stand on an equality, upon the authority of *Choteau v. Thompson*, 2 Ohio St. 114, and that the decision of this court in *McCullom v. Richardson*, 2 Handy, 276, was not consistent with the ruling of the Supreme Court, but we do not feel the difficulty suggested. It seems to us that the distinction taken by Judge Gholson was sound—holding that although the liens taken by mechanics for work done in erecting the same building are equal as to priority, yet the subcontractors, who present their accounts against the contractor or builder, like attaching creditors, if prior in time, are better in right as between themselves. But Greenlees & Ransom Co. and Long claim that neither the plaintiffs nor Dunn & Witt are entitled to any part of this fund until they have been paid, because the claims of plaintiffs and of Dunn & Witt were for work done and materials furnished under the written contract with Bearly to build the school-house for the sum of \$81,000, which had been paid when these claims of the plaintiffs and of Dunn & Witt were presented. They claim that this fund now remaining in the hands of the city was destined to pay for extra work which was not done under the said written contract.

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The claim is, and the evidence shows, that the bills of the plaintiffs and Dunn & Witt were all for work done under the original written contract, and not for extra work and materials. It is claimed that the bills of the other subcontractors, Greenlees & Ransom Co. and Long, were for work extra the written contract and extra the \$81,000. The principal item of this extra work consisted of the work and materials for a frame privy.

The second section of the mechanics' lien act, S. & C. 834, provides that every person doing work or furnishing materials for a building erected under a contract between the owner and builder, whose bill has not been paid, may deliver to the owner an attested account, and thereupon the owner shall retain from the contractor an amount to meet the bill presented. The act contemplates that the work has been done by the subcontractor under an employment or contract with the builder.

The \$1,377 which the city still owed is supposed to be for extra work and materials not specifically called for by the written contract, unless under the clause relating to extra work and changes. This clause was as follows: "Moreover, it is understood and agreed that if any changes in said plans and specifications and the work corresponding thereto are considered advisable or necessary the same may be done, and shall be executed by said Bearly at such price as may be agreed upon between him and the superintendent of building; but the same shall not be made without the consent of the building committee of said board, nor unless a memorandum of said changes and the price thereof be first made and signed by said Bearly and said superintendent."

We think that the city might and did waive the formalities as to extras provided for in this contract, but did not thereby prevent them from being part of the job and falling under the general contract.

What, then, was the nature of the extra work and materials done and furnished here for which the city owes Bearly.

The principal item was a frame privy, for which there was

a new specification separate from and subsequent to the original plans and specification, and not signed. It was a separate building, though part of the establishment, and substituted in place of a brick building which was to have been erected in the same place. There were other items of extra work for which no written subsequent stipulation or specification is shown to have been made or signed.

Greenlees & Ransom Co. present a claim of \$223.18, work and materials done and furnished for the frame privy, and of \$100.50 for other extra work and materials not included in the original contract nor by additional and supplementary written stipulations, making their entire claim \$323.68.

Edwin Long presented a similar claim of \$35 for painting the extra privy, other extra work \$29.70—making in all \$64.70.

Both these claims amount to but \$388.58, so that if allowed there would still be a balance of nearly \$1,000 in the hands of the city as to which the question would remain, whether the plaintiffs and those holding like claims could reach it by this proceeding; for, if they can reach it at all, it is not apparent why they should not reach it in their order, that is, in the order of time of service of notice; and if they did not get such a lien as to maintain their order of time against the liens subsequently taken, we know of no principle on which they can be held to have any lien or claim at all upon this fund in this case. But we think that the policy of the mechanics' lien law requires that extra work and extra materials done and furnished on a job which a contractor has contracted in general to perform, shall be included in the lien taken under the act, and that the notice served upon the owner covers the money due for the extras as well as that which is called for by the original plan and specifications. This was held in New York, *McAuley v. Mildrum*, 1 Daly's R. 396, 399, where the court say, "As there was some evidence that this work became necessary, in consequence of defects in the plan, I think that it might fairly be regarded as

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covered by the notice, and that the referee did right to allow it."

If there were no unpaid subcontractors except the plaintiffs, would they have a right to stop this fund by presenting their account?

This is but another form of the same question we have been considering. It seems to us that this indebtedness of the city falls within the purview of the contract as regarded by the statute.

It was held in *Choteau v. Thompson*, that "where materials are furnished, from time to time, for a particular purpose, as, for instance, the construction of a house, and the dates are so near each other as to constitute one running account, the lien dates from the time the first article was supplied, although, strictly speaking, the articles were not furnished under one entire contract." Nor is there priority among different lien-holders. "The idea upon which the law proceeds is, that the building is the result of the labor and materials of the various persons: material, men, stone-masons, brick-layers, carpenters, painters, etc. The work of some of these must precede that of others, but each contributes his proper share to the value of the structure. Its value, when finished, is derived from these several contributions."

On the whole case we conclude that the plaintiffs are entitled to the fund, and that the judgment must be rendered accordingly; but all the costs may be paid out of the fund.

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JOSEPH S. COOK AND WIFE, Plaintiffs in Error, v. JAMES O. SHIRAS, Defendant in Error.

Where a mortgage was lost in its transmission by mail to an attorney for collection, to whom sundry payments were made reducing the mortgage debt to \$1,500, and the mortgagor afterward made a note for \$500, to the order of the attorney, taking a receipt that when paid the amount should

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be credited on the mortgage; and, afterward, a third person took up the mortgage, and, by agreement with the mortgagors, included the \$500 note, and extended the time of payment two years, as evidenced by a new note for \$1,500, and also agreed that the mortgage should stand as a security for the debt, and that when the new note was paid it should be canceled.

*Held*, that here was an equitable assignment of the mortgage, which covered the amount of the \$500 note, and that the third person, who paid to the holder the amount due on the mortgage, is entitled to be substituted in the place of the original mortgagee, and to hold the land as if he were his assignee.

ERROR TO THE SPECIAL TERM.—The facts appear in the opinion.

*Jordan, Jordan & Williams*, for plaintiffs in error.

*Collins & Herron*, for defendant in error.

HAGANS, J. The record in this cause discloses the following facts:

In 1862, Collins & Herron, attorneys of this city, received of one Reynolds for collection a claim for \$3,000, secured by a mortgage on the property of the plaintiffs in error, Cook and wife, which mortgage was lost in its transmission by mail. Sundry payments in cash were made on account by the Cooks, who were also represented by Collins & Herron, reducing the claim to \$1,500.

In May, 1866, Cook made a note, payable to the order of Jno. W. Herron, for \$500, for which he gave a receipt that when the note was paid it should be credited on the Reynolds' mortgage. This note was renewed twice and was finally settled, and Reynolds paid in November following as follows: Mrs. Elizabeth Coolidge took up the mortgage, and by agreement with the Cooks extended the payment for two years. A new note for \$1,500 was made by Cook and wife, because the mortgage note was lost, payable to Mrs. Coolidge, and she gave a receipt to Cook and wife, stating that when that note was paid it should be in full payment and

the mortgage should be canceled. The amount due on the Reynolds claim, including the amount of the note given to Herron, and some other small amounts, were calculated and the difference between that and the sum obtained of Mrs. Coolidge was paid in cash by Cook. The Coolidge note was afterward purchased by the defendant in error, by Herron, who was then his guardian, and now owns it. Nothing has been paid on it.

Through all these transactions it was agreed by the Cooks that the mortgage should continue as security for them. This statement presents the case fairly as we find it in the testimony and as the judge below determined it, though there are minor points not of sufficient moment to deserve more than this notice.

The judge below rendered judgment for the defendant in error for the full amount of the mortgage and interest, \$1,683.75, and inasmuch as the life-estate of Mrs. Cook could not be subjected under the mortgage, decreed the appointment of a receiver to collect the rents of the mortgaged premises to pay the judgment, to all which exception was taken.

It was admitted that here was an equitable assignment to the defendant in error of the mortgage in question, but the dispute turns upon the amount to be collected under it. It is said that as to the note for \$500 given to Herron there was no agreement that it should be secured by the mortgage, and that where an attorney voluntarily pays money for his client there can be no subrogation unless by agreement. Dixon on Subro. 164-166. But here, besides the fact that Herron represented the debtor, the arrangement of November with Mrs. Coolidge, and giving the \$1,500 note by the plaintiff in error, without considering anything else in the case, seems to be decisive that the Cooks intended that this \$500 should be covered by the mortgage; and we think, for the purpose of effecting the substantial justice of the case, that the party who paid the money due on the mortgage is entitled to be

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substituted in the place of the mortgagees and to hold the land as if assignee of the mortgage. *Robinson v. Leavitt*, 7 N. H. 99; *Low v. Blodgit*, 1 Foster, 121; *Richardson v. The Wash. Bank*, 3 Met. 536.

The judgment will be affirmed.

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FRANZ SCHOENFELD ET AL., Plaintiffs in Error, v. JOS. A. HEMAN & Co., Defendants in Error.

In the assignment of errors in a bill of exceptions the error sought to be assigned must be distinctly pointed out, otherwise it will be held to have been waived.

ERROR TO SPECIAL TERM.—The facts appear in the opinion.

*Long & Kramer*, for plaintiffs in error.

*Pugh & Pugh*, contra.

HAGANS, J. This is a suit upon a promissory note, of which the following is a copy:

“\$3,000.

CINCINNATI, January 31, 1869.

“Four months after date we promise to pay to the order of Jos. A. Heman & Co., three thousand dollars, at the banking house of Jos. A. Heman & Co., value received.

“GELLENBECK & Co.”

Indorsed: “*B. Gellenbeck, Franz Schoenfeld.*”

The petition charges Gellenbeck & Co. as makers and B. Gellenbeck and Schoenfeld as indorsers, and avers that on 3d June, 1869, the note was duly protested for non-payment, and demands judgment for the amount of the note, and interest and costs of protest.

None of the defendants below answered but Schoenfeld, who denied his liability as indorser or otherwise. He alleged, that being applied to by the makers of the note for

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his indorsement, and being unacquainted with their character and solvency, he went to defendants in error, who were bankers, and asked them in relation to the character and solvency of Gellenbeck & Co., and they falsely and fraudulently represented that Gellenbeck & Co. were a solvent firm and in good standing, and relying solely on these representations he indorsed the note. He alleges that Gellenbeck & Co. were at the time in failing circumstances and unworthy of credit and that defendants in error knew it, and he asks to be discharged.

On the trial before a jury, the plaintiff, Schoenfeld, stated that he had indorsed a note for the Gellenbecks for a like amount, which was held by the defendants in error, and of which the note sued on was a renewal.

The original note became due on the 31st January, 1869—the date of the note sued on—and the Gellenbecks told him on the morning of that day they could not pay it, and wanted him to indorse the note sued on. He thereupon went to the office of defendants in error and saw Heman, whom he had never seen before, and told him he had come to see about a note on which Frank Gellenbeck was indorser. He also told Heman that the parties wanted to renew the note, and that he did not like to indorse it; to which Heman replied that the Gellenbecks had some trouble with one Varwig, from whom they were compelled to take a mortgage, and that was the reason why they did not pay the note; that Henry Gellenbeck was of no account, but that if George Gellenbeck said so it was all right. It seems the plaintiff in error went to George Gellenbeck to see if what Heman said was right, and George said “yes,” and thereupon he wrote his name on the back of the note sued on; and that at this time the Gellenbecks had property out of which the original note could have been made. When the note sued on fell due the Gellenbecks were insolvent. Schoenfeld did not procure the discount of the original note or get any of the proceeds of it.

Heman testified that when the first note was offered for



discount he inquired about Schoenfeld and found him responsible as well as the elder Gellenbeck. When it fell due Schoenfeld came to see him, but he does not remember the conversation Schoenfeld details, but that it is his impression he did not make the statements as testified to by Schoenfeld.

On this state of the case the parties agreed that the jury might render a verdict for the defendants in error, subject to the opinion of the court upon the law of the case; and thereupon Schoenfeld filed a motion for a new trial: first, because the court misdirected the jury; second, because the verdict was contrary to the evidence; and third, because it was contrary to the law.

On the hearing of the motion for a new trial affidavits of both Heman and Schoenfeld were read, which do not materially change the statements made before the jury, except some variations of the statements of both parties, which do not affect the substantial question in the case. There is a professional statement of counsel, which was addressed to the discretion of the court, in connection with the affidavits of the parties containing cumulative testimony only, which the judge at Special Term did not think sufficient to authorize him to grant the motion for new trial, and he accordingly overruled the same and entered judgment on the verdict.

The assignment of errors is a repetition of the reasons for a new trial. There does not appear any exception to the charge of the court, and we are not disposed to disturb the verdict of the jury on the evidence, for we think that the verdict was right.

But it is said that the judgment is erroneous in this: that the liability charged in the petition against the plaintiff in error is that of an indorser and not that of a guarantor or joint maker, which in fact it was; and that although the defendants in error might have amended their petition, to make it conform to the facts proved, and though the judgment might then have been good, still it is now too late to amend, and the judgment is bad. It is said that if Schoen-

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feld be a guarantor he had no sufficient notice of the default of the principals, Gellenbeck & Co. To this last it will be sufficient to say, that at the maturity of the note the Gellenbecks are admitted to have been insolvent; besides, the plaintiff in error had sufficient notice.

The plaintiff in error seems, at no previous time, to have called any attention to the variance between the pleadings and proofs, and may be deemed to have waived it, because there is no assignment of errors broad enough to cover it.

Our Supreme Court has frequently held that the error must not only appear affirmatively, but must be specifically pointed out. This the party has not done. *Armstrong v. Clark*, 17 Ohio, 495; *Little Miami Railroad Co. v. Collett*, 6 Ohio St. 182.

The judgment must be affirmed.

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T. G. GAYLORD & Co. v. IMHOFF AND ANOTHER, Partners.\*

Individual members of an insolvent copartnership, not the owners of other property, are severally entitled to the exemption allowed by the State "Homestead Laws," out of the partnership fund, even as against creditors of the firm.

The object of exemption and homestead laws discussed and defined.

In this cause judgment was recovered, the property of the defendants sold on execution, and the proceeds were in court for distribution.

A judgment was made by the judgment debtors, claiming the benefit of the exemption allowed them by law as heads of families and residents of Ohio, setting out that neither of them were the owners of homesteads, or possessed of other

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\* Though this case was decided at a prior term to the one with which these reports were begun, but at the request of members of the bar who deemed the questions contained to be of great interest and importance, it is inserted here.

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property, as provided by the amendment of May 22, 1858, to the "Homestead Law."

An agreed statement of facts was filed by the counsel for the parties, "that all the property levied on and sold was partnership property, including the leasehold; and that the affidavit and demand of exemption by the defendants were filed by the defendants with the sheriff before the sale, setting forth that they were heads of families, and not the owners of homesteads or any other property."

The copartnership creditors resisted the claim on the ground the property belonged exclusively to the creditors of the firm, and was subject to the payment of all the firm debts before the individual partners could have any legal right to the joint assets.

All the questions arising under the motion were reserved for the opinion of the court in General Term.

*Matthews & Ramsey*, for the motion.

*Challen & Mitchell*, contra.

STORER, J. As a general rule, the objection urged to the right of partners to a share of the joint assets before the partnership debts are satisfied is the true one; but the case before us is one where both the partners, who were originally interested in the fund now in court, apply for the exemption allowed by law; neither can be said to sustain the same relation to the other, which would exist, if one were solvent and the other insolvent, for in such case the burden which ought to be borne by both would be imposed upon him alone who had the ability to discharge it.

A copartnership creditor, as such, has no better lien on the property of the firm than the creditor of an individual partner. To use the language of the books, he can only work out whatever right he may assert through the partners themselves. And hence it is in marshaling the fund where all the parties are before the court, we are permit

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ted to appropriate it in the first place to the creditors of the firm.

In a contest between creditors where no intervening right exists, there can be no difficulty in coming to a correct conclusion. We are asked, however, to hold that the homestead and exemption laws, which were enacted for a kindred purpose, can not apply to a case like that at bar, on the assumption that when capital has become invested in a joint adventure, either the identity of the original individual owner, with his share of the common property, is lost, or he must await the winding up of the partnership, when all the liabilities having been discharged, the statutory privilege may then be allowed him. This argument would defeat the object of the law, in that the debtor, if owing as an individual, would be permitted to enjoy the exemption, while his joint liability with others would give the creditor the power to take the last farthing of his substance.

It is urged that dower will not be granted where the estate in which it is asked belongs to a partnership, until all the liabilities of the firm have been met, and we admit the rule, though it has been modified by late decisions; but this has been determined on the ground that the property, though legally vested by deed in the partners, is held nevertheless in trust for the payment of debts. This rule is not now, nor has it ever been the law in Ohio as to personalty; no matter how large the decedent's indebtedness may be, his widow is allowed a reasonable sum for her year's support, to the exclusion of all creditors. The property sold by the sheriff, the proceeds of which are now in court, was machinery in a manufacturing establishment and a leasehold for a term of years.

Can there be any greater equity, on the part of those to whom a copartnership is indebted, than that the creditors of an individual might claim, when we are asked to give a construction to a statute, the object of which, before it can be fully carried out, requires us so to interpret it as to effect the humane purpose for which it was enacted? We

regard the whole series of laws on this subject as remedial; not as restricting a prior right, but as reserving to the unfortunate debtor some portion of the wreck of his property to save him from immediate want and encourage future effort. This is the view taken by the New York courts in deciding the policy of their exemption laws. *Carpenter v. Herrington*, 25 Wendell, 370; *Ford v. Johnson et al.*, 34 Barb. 365; *Robinson v. Wiley*, 15 N. Y. 494. Homestead estates, as well as the present system of exemptions which exists in twenty-nine states of the Union, owe their creation to State legislation only. By the common law there is no analogous interest secured to a debtor. If we should trace the progress of the now liberal protection afforded to families from the exactions of a husband, or a father, or son, we should find matter for interesting inquiry and study. We need not refer to the laws of the twelve tables, giving the debtor's body to those he owed to be divided among them; nor yet to the barbarous claim asserted as late as the present century to arrest the body of an insolvent after death; nor to the power, until within the last twenty-five years allowed even in Ohio to the creditor in any case, without oath, to sue out a *capias* as the first process in an ordinary suit.

Imprisonment for debt in all its forms, except for the frauds of the debtor, is now abolished, while the remedy even in the cases allowed by statute, is seldom resorted to; and we may apply the same remarks to the privilege now given to the debtor and his family to retain a portion of his property exempt from execution. From the wearing apparel, a few articles of furniture, the school books, a domestic animal or two, the policy of our legislation has steadily increased the exemption, until, by the statute of April 9, 1869, \$500 is allowed the debtor not the owner of a homestead, but who is the head of a family, in addition to the ordinary exemption from sale on executions.

To carry out the policy so humanely adopted, and which has been so universally approved, where the purpose is to confer a great public benefit we must divest the questions

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before us of all legal technicalities, and look directly to the important end our legislators must have intended to accomplish by the various statutes they have enacted. If it is true, the fact of a partnership once formed excludes all individual interest in the property it may hold, that to a manufacturing establishment, or any other association of craftsmen who may unite for a certain object, none of the statutes we have referred to apply; while if the parties have individually pursued the same employment they could be protected in their several exemption rights, then it must be confessed the law can not have effected its purpose.

To admit the personal privilege, and deny it to the same man when a partner, must discourage all voluntary unions whereby capital may be increased and business expanded, for such associations will virtually absorb the personality of the several members into the mere legal entity it has produced.

Hence it will be if one carrying on business on his own account, in winding up his affairs, find there is no sufficient fund to pay creditors, he will nevertheless be allowed the entire exemption if it should include his whole assets; yet if he become a partner he has forfeited his statutory right.

The argument which assumes such a rule to be the true meaning of the law, is defended mainly on the ground of *ab inconvenienti*; but this maxim, in the interpretation of statutes, is seldom applied, and never where the language of the law is plain and its terms readily understood. If the law is constitutional it must stand as the rule of our decision.

We find but few reported decisions upon the point in controversy, though there are many in which individuals have been the party applying for the exemption and the question before us does not arise.

In *Radcliff v. Wood*, 25 Barb. 52, the Supreme Court of New York held that joint ownership of property did not exclude the right of exemption; and the Court of Appeals in *Stewart v. Brown*, 37 N. Y. 350, decided the exact question. They say, "The language of the act should be con-

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strued in harmony with its humane and remedial purpose. Its design was to shield the poor, and not to strip them. The interest it seeks to protect is that belonging to the debtor, be it more or less."

A contrary opinion has been given by the Supreme Court of Pennsylvania, in *Bonsall et al. v. Comly*, 44 Penn. 442; but we are not convinced by the reasoning of the judge, who places his objection to the debtor's claim upon the same ground the counsel for the creditors have urged in argument before us.

We are better satisfied with the decision of the New York court for the soundness of their reasoning, and the practical recognition of what we believe is the only true rule by which statutes of exemption are to be interpreted.

Such would seem to be the policy of the present bankrupt law. By the 14th section, 14 Statutes at Large, 522, there is secured to the bankrupt personal property not exceeding \$500, to be excluded from the general assignment of his effects; while the 36th section, which refers to partnerships and corporations, makes no distinction between that class of debtors and individuals, no language being used restricting in express terms, or by fair implication, the privileges secured by section 14.

On a careful review of all the provisions of our homestead and exemption laws with whatever light we can obtain from adjudged cases, taking into consideration the purpose which the legislature intended to accomplish, we are led to the conclusion that we can not exclude partners from the privilege of claiming the statutory exemption in the same manner, and for the same reason that we are bound to extend it to the individual debtor.

There may be an apparent conflict between our ruling and the law, which in ordinary cases defines what are partnership assets and how they shall be administered, more especially with the principle that the obligations of the joint relation must first be met, before there is any such interest in either of the parties as can be charged with their

individual debts; but these difficulties are removed when we regard the object of what are sometimes termed "the modern innovations on the rights of creditors," but what in reality are the consequences of a more advanced civilization. It is true the debtor may retain a small portion of the property, for he is not only allowed still to live, but to look forward to the time when by industry and economy he may retrieve his fortunes. Yet he is not, as by the bankrupt law, forever discharged from his debts; his creditors may still claim the future reward of his labor. The exemption is to provide for present necessities, to encourage hope for the future, to show by awarding the privilege that the insolvent is not forgotten by the law, but continues to be a citizen and a man.

We are all of opinion that the exemptions asked should be allowed, the amount of each to be fixed by the statute of 1850, with the amendment of March 22, 1858, and the case is remanded to Special Term, that the proper entry may be made fixing the sum for each claimant.

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DAVID GIBSON & Co. v. THE FARMERS AND MECHANICS' INSURANCE COMPANY.

The defendant refused to pay the insurance on a steamboat lost by fire, on the ground that two competent watchmen were not employed, and at the time of the accident no watchman was on duty. The plaintiff says, that by agreement one watchman was waived, in which respect the policy ought to be reformed; but that in fact two were employed and one was on duty at the time. The testimony was to the effect, that while the watchmen had gone to their supper, on the top of the river bank, the boat took fire and was burned; also, that it is the usage for the watchmen to get their meals on shore when the steamboat is in port. At Special Term the judge instructed the jury to inquire whether one watchman was waived by the agreement or not; if not, whether two watchmen were employed, and one was on duty at the time, within the fair intent and



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meaning of the policy. A verdict was returned for the plaintiffs, and the defendant's motion for a new trial was overruled.

*Held*, that having due regard to the circumstances and the purposes of the stipulation contained in the policy of insurance, the charge to the jury was correct, and the motion for a new trial should be overruled.

RESERVED FROM SPECIAL TERM.—The facts appear in the opinion.

*Lincoln, Smith, Warnock & Stephens*, for plaintiffs.

*Long & Kramer*, for defendant.

HAGANS, J. This is a motion for a new trial, reserved on the following facts:

The plaintiffs had a risk in the Boatman's Insurance Company, on the steamboat Louisiana, for \$3,000, which contained a printed clause providing, "that while in port or laid up, at least *two* competent watchmen shall be employed, one of whom shall be on duty at all times," and also a written clause, "one watchman waived." That company becoming insolvent, the defendant took the risk exactly as it was in the Boatman's Insurance Company, as is alleged, except only as to the amount, which is \$2,000; and for this purpose the policy in the Boatman's Company was sent to the defendant to be exactly copied. It seems, however, that the defendant omitted, in the policy sued on, the written words "one watchman waived," and on this the controversy turns.

The boat was lost while lying up at Cairo, and the defendant refused to pay, on the grounds that there were not *two* competent watchmen employed, and that at the time, and immediately before the disaster, no watchman whatever was on duty.

The plaintiffs asked that the policy sued on be reformed, if necessary, according to the alleged agreement that "one watchman was waived;" but claimed that in fact they employed two competent watchmen, and that one of them was on duty at the time.

It appeared in evidence that the plaintiffs employed one

watchman as such, who had been on the river fifteen years; and also the clerk, J. L. Eaton, who was a man of large experience, to assist him. While they were gone to supper, at their boarding house, on the top of the river bank, in daylight and in sight of the boat, the boat took fire and was burned. No fire was on the boat, and no cooking; but the watchmen slept there. There was evidence to the fact that it was always the usage among steamboat watchmen to get their meals off the boats they had in charge while lying up. No cooks were kept on board, and no cooking done, because it was safer. Sometimes a watchman would speak to a watchman on a neighboring boat to keep an eye on the boat until his return.

The court charged the jury to inquire whether "one watchman was waived" by the agreement of the parties. If not, they were to determine whether two good and sufficient watchmen were employed, and whether one of them was on duty at the time; that the policy required that they should be good and prudent men, acquainted with steamboats and steamboating, and that one of them should be on duty at all times; that the law did "not require that the watchman should be guilty of no want of care or inattention to his duties; but that he should be on duty within the fair intent and meaning of the policy; and it was for the jury to say, under the circumstances of the case, whether one watchman was on duty at the time of the loss or not, and whether it was unreasonable for the watchmen to step on shore to get their supper under the circumstances and a departure from duty. Was it a thing unusual under the circumstances?"

The judge below then proceeded to quote from the opinion of the court in *Hovey v. The American Mutual Insurance Co.*, 2 Duer, 569: "It is contended that a warranty must be literally complied with. The warranty was that the plaintiffs, during the policy, would "keep and maintain a night-watch on the premises." They did keep and maintain one there every night, who on no occasion left the premises.

They did not agree that he should never look off them, or on no occasion be dozing or fall asleep. The spirit of the warranty is, that there should be a competent night-watch kept there, and one who might be confided in for the faithful performance of a night-watch."

The judge also quoted to the jury from the opinion of Shaw, C. J., in *Crocker v. People's Mutual Fire Insurance Co.*, 8 Cush. 79: "The stipulation, 'a watchman kept on the premises,' inserted, as it is, in the body of the policy, immediately after the description of the property insured, is in the nature of a warranty, and must be substantially complied with by the assured. But the terms are not explicit as to the time and manner of keeping a watch. It does not stipulate for a constant watch. It therefore requires construction as a matter of law to determine what is meant in this policy by keeping a watch. It relates to a factory—to its safety against fire—and this depends upon a habit or practice in this respect and upon the fact whether that usage has been followed. Where there is an express stipulation that a thing shall be done, but the contract is silent as to the time and manner, the law holds that it must be reasonable in this respect, having regard to the object and purpose of the stipulation—in this case to the safety of the building. If it is done in a manner in which men of ordinary care and skill in similar departments manage their own affairs of like kind, this is one strong ground to hold it reasonable and to warrant the admission of evidence of usage."

The judge at Special Term then proceeded with his charge: "Now, if the jury shall find that it was the agreement of the parties that one watchman should be waived, then they might well find that the plaintiffs had performed their duty in this behalf; but if they should not so find they would determine whether there was one watchman on duty at the time of the loss, within the fair intent and meaning of the policy. Were they on duty as is usual, and was it unreasonable for them to step off the boat for a few minutes to get their supper, under the circumstances detailed to

you in the evidence? Was this such a performance of their duty as a prudent man having it in charge would have adopted?"

No exceptions were taken to this charge, but the defendant asked the court to charge the jury, that "if two watchmen were by the terms of the policy to be employed, and the jury shall find that one of such watchmen was not waived, then the defendant has the right to the presence of one of such watchmen on or about the boat at all times;" which charge the court gave, subject to the general charge.

The jury brought in a verdict for plaintiffs for the full amount of the policy, and defendant made a motion for a new trial, which was reserved.

There is nothing in the verdict or in the record to determine whether the verdict was founded on the issue, whether the policy should be reformed by inserting "one watchman waived," or whether the jury proceeded on the ground that there were actually two watchmen employed, and that one was "on duty at all times," within the fair intent and meaning of the policy. The case was left to the jury under this double aspect. It is not contended that, if in fact the policy should be reformed, the verdict was wrong. On the contrary, it was admitted at the trial that plaintiffs were entitled to recover. The defendant sought a direction to the jury only on the other aspect of the proof; and it is upon this view that the questions made arise.

It is not contended that there were not two competent watchmen employed by the plaintiffs, within the fair intent of the policy. The main point made by the defendant's counsel was as to the meaning of the words "one of whom shall be on duty at all times." The defendant evidently regarded them to mean "one of whom shall be *on or about the boat* at all times," as appears from the special charge asked. And certainly the defendant can not take much by the exception, for the judge gave the charge as asked, qualifying it by the general charge.

It is contended that the judge erred in submitting the

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question, under the evidence, whether the watchman performed his duty as a prudent man having a boat in charge would have adopted. We see no error in this.

But it is said, that by the language of the policy it was intended by the parties to the contract that one watchman should be on board the boat at all times, and that that was the very reason of making the provision for two watchmen. If this were so it would have been easy to have inserted that language in the policy. The term, "one of whom shall be on duty at all times," does not necessarily imply that one of the watchmen shall be on the boat at all times. There is nothing inconsistent with the duty of the watchman on duty that he should take his meals off the boat, having due regard to the circumstances of the case, or that he should do any other necessary thing, not inconsistent or unreasonable, in relation to the performance of his office. He may as well be on duty, in this view, off as on the boat, and as strictly comply with his obligations under the policy. And where the contract is silent as to the time and manner, "the law holds that it must be reasonable in this respect, having regard to the purpose and object of the stipulation;" in this case to the safety of the boat.

We think the directions to the jury were right, and that the motion for a new trial should be overruled.

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MARSHALL & BRO. v. FLINN.

Where the sheriff returned a sale of real property on execution to Wenstrup for two-thirds of the appraisement, but that the purchaser had refused to pay the purchase money, and the plaintiff in execution moved the court to confirm the sale, but the court overruled the motion and set aside the sale:

*Held*, that the motion was addressed to the sound discretion of the court,

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and that no such abuse of the judicial discretion was shown as to constitute error in this case.

*Israel Ludlow and Mallon & Coffey*, for plaintiffs.

*Fox & Bird*, for defendant.

Taft, J. The question in this case is, whether the judge at Special Term erred in setting aside a sale made by the sheriff to a purchaser, who refused to make good his bid by paying the purchase money.

The return of the sheriff was, that on the 1st of April, 1871, he offered the property "at public sale, in the rotunda of the court-house; and then and there, at public outcry, *struck off and sold* to John Henry Wenstrup the property" [describing it] "for the sum of \$4,000 (and notwithstanding demand has been made, the purchaser has refused to pay the whole or any part of the purchase money), it being two-thirds of the appraised value of said lot of land, and the said John Henry Wenstrup being the highest and best bidder for said premises and the purchaser thereof."

The plaintiffs in execution moved the court to confirm the sale. This the court refused to do, but did set the sale aside.

On the one side, it is claimed that the sale was valid, and that if the plaintiffs insist that it be confirmed the court is bound to confirm it, and errs if it refuses to do so.

On the other side, it is claimed that the return of the sheriff is equivalent to a return of no sale, and that it can not be confirmed.

On behalf of the plaintiffs, a distinction is taken between a sale made by the sheriff on an execution and by a master on an order in a proceeding in equity. But we think that when a sale comes before the court for confirmation, whether upon an execution or upon an order, the court is to exercise a sound discretion. And while we think that the return need not be treated as a return of property unsold, we nevertheless regard the circumstances of this case such that the judge was justified in setting aside the sale.

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We do not intend to be understood to hold that the court could not recognize the sale, and enforce it by authorizing a suit or even by an attachment for a contempt of court, as was done in the case of *Lansdown v. Elderton*, 14 Ves. 512, and in *Brasher v. Cortlandt*, 2 John. Ch. 505; *Saville v. Saville*, 1 P. Wms. 745.

The bidder does assume a responsibility when he makes his bid. He can not be permitted to trifle with the process of the court. But he may not be pecuniarily responsible, so that it would be injurious to the parties to have the sale enforced; and there may be other reasons why the sale should be set aside, extra the record.

The judge at Special Term, before whom the question came, had a discretion which he has exercised, and which we do not find reason to interfere with. If he had ruled the other way we might not have felt called upon to interfere.

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W. F. & V. WHITNEY v. DENTON & CHATTLE

*Caldwell, Coppock & Caldwell*, for plaintiff.

*Thos. G. Mitchell*, for defendants.

TAFT, J. The plaintiffs, owning certain lumber lands in Pennsylvania, and having made a contract with Sherman to manufacture lumber at an agreed compensation, sold to the defendants one undivided half of the lands, and became partners with them in the manufacture and sale of lumber from the lands, allowing the firm the benefit of the contract with Sherman while the firm continued; and the firm likewise employed Marsh to haul the lumber and run it down the river to Cincinnati.

The partnership thus formed was dissolved in June, 1861, by a written contract, specifying a sale by the plaintiffs

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of their interest in the lands and in the contract with Sherman, and a transfer to the defendants by the plaintiffs of their account for moneys paid to Sherman on the contract with him, and to Marsh for hauling, etc., but making no mention of the moneys which had been paid by the defendants to Sherman on said contract, and to Marsh, and providing for a future settlement of the partnership accounts.

*Held*, that it was competent for the plaintiffs to prove by parol evidence that the payments which had been made by the defendants to Sherman and to Marsh were part of the consideration of the sale and transfer by the plaintiffs to the defendants of their interest in the lands and in the Sherman contract, and were not to be charged to the plaintiffs in the final settlement of the partnership account between the plaintiffs and the defendants.

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ELLIOTT CLARK, Plaintiff in Error, v. MARY ANN HARLAN,  
who sues by her next friend, Defendant in Error.

An action will lie in favor of a married woman against a third person for enticing away and harboring her husband.

The petition in this cause was originally filed against the defendant, now plaintiff in error, and Robert Harlan, the plaintiff's husband, against whom, on demurrer, the court held the action could not be maintained.

The petition seeks to hold the defendant liable in damages for "wrongfully and maliciously enticing away the plaintiff's husband from her residence, whereby she has been, for a long space of time, and still is, deprived of his society, protection, and support." It is also alleged, "that her husband has been detained and harbored by the defendant in his private residence, to which the plaintiff has not been admitted, notwithstanding all her efforts to live with him and enjoy



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the privileges of a wife." The plaintiff further avers, "that her separate property, owned at the time of her marriage, has been enjoyed by her husband, whose personal services are required to take proper care of her interest therein; of all which she is also deprived by the acts of the defendant."

To this petition the defendant demurred, and at Special Term the demurrer was overruled. To this, exception was taken, and the case taken on error to General Term.

*Tector & Cole*, for plaintiff in error.

*Applegate*, contra.

STOREY, J. It is urged that the pleadings do not present a case for our interference.

In the leading case of *Winsmore v. Greenbank*, Willes Rep. 377, where the plaintiff sought to recover damage for the enticing away and detaining his wife by the defendant, after a verdict for 3,000*l.*, on motion to arrest the judgment, Chief Justice Willes, in deciding the questions made by counsel, said: "The first general objection is, that there is no precedent for any such action as this, and therefore it will not lie; and the objection is founded on Lit. f. 108 and Co. Lit. 81 b., and several other books. But this general rule is not applicable to the present case; it would be if there had been no special action on the case before. A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy; but there must be new facts for every action on the case."

In the subsequent case of *Chapman v. Pickersgill*, 2 Wilson, 146, Chief Justice Pratt, in an action for maliciously suing out a commission of bankruptcy, used these words: "It is said such an action as this was never brought before; and so it was said in *Ashby v. White*. I wish never to hear this objection again. This action is for a tort; torts are infinitely various, not limited or confined; for there is nothing in nature but may be made an instrument of mischief." The masterly reasoning of Chief Justice Holt, in

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*Ashby v. White*, 2 Ld. Raymond, 957, which was sustained in the House of Lords early in Queen Anne's reign, is entirely in harmony with this doctrine; and we must be permitted to quote a remark of that venerable jurist which is full of meaning: "Let us consider," he says, "in what the law consists, and we shall find it to be not in particular incidents and precedents, but in the reason of the law. *Ubi eadem ratio ibi eadem lex.*"

In the case of *Pasley v. Freeman*, 3 Term R. 45, which was then regarded as one of first impression, Lord Kenyon, who always upheld a strict adherence to the established law, after one of his brethren, Mr. Justice Grose, with whom he differed, had stated that he found no precedent for the action, uttered the ever-memorable words: "All laws stand on the best and surest basis which go to enforce moral and social duties."

Mr. Justice Ashurst, in his opinion, said: "Another argument has been made use of, that this is a new case, and that there is no precedent for such an action. Where cases are new in their *principle*, there, I admit, it is necessary to have recourse to the legislative interposition in order to remedy the grievance; but where the case is only new in the *instance*, and the only question is upon the application of a principle recognized by the law to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago."

The judgment in that case was for the plaintiff, and since it was given had always been followed as the established law.

This court, in General Term, in *Campbell's Administratrix v. Rogers et al.*, 2 Handy, 117, after a thorough examination of the authorities, came to the same conclusion, relying on the case just quoted to sustain their judgment. We are satisfied that there is no difficulty in upholding the present action against the objection that no precedent can be found where a precisely similar case has been presented to the courts.

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There certainly could be no objection if the husband had brought the action for enticing away his wife, as his legal right to complain can not be questioned; but how far the case is changed when the wife sues is to be considered.

We can find but one case reported where the point has been discussed. It is that of *Lynch v. White and wife*, decided in 1861, and reported in 9 House of Lords Cases, 577. Knight  
★ There Campbell, Lord Chancellor, after hearing full argument said: "Although this is a case of first impression, if it can be shown that there is presented to us a concurrence of loss and injury from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of *consortium* or conjugal society can give a cause of action to the husband alone. The loss of conjugal society is not a pecuniary loss, and I think it may be a loss which the law may recognize to the wife as well as to the husband." In this case the gravamen of the action was that the defendant had slandered a married woman, in consequence of which her husband had abandoned and lived apart from her; and although the case was finally decided for the defendant, it was upon the ground that no special damage had been averred or proved. The Law Lords gave their opinions, concurring that the words uttered by the defendant furnished no ground of action merely from the general consequences resulting from what was admitted to be the law, but that there must have been special damage. Lord Brougham, in commenting upon this opinion of the chancery, emphatically adds, "I must add that I entirely agree with what my late noble and learned friend says toward the end of his judgment. He laments the unsatisfactory state of our law, according to which the imputation, by words however gross, on an occasion however public, upon the chastity of a modest matron, or a pure virgin, is not actionable without proof that it has actually produced special temporal damage to her. The only difference of opinion I have with my noble and learned friend is, that instead of the word "unsatisfactory" I should substitute the word "barbarous." I think that such a state of things

*John T. Harlan*

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can only be described as a barbarous state of our law in that respect."

In this state we have no such difficulty to encounter. It has long been the settled law in Ohio, that any accusation affecting the chastity of a female is actionable *per se*. See *Murray v. Murray*, *supra*, p. 290, and cases cited.

If the husband's right to claim damages for the loss of his wife's society, his "*solatium*" as the civilians term it, arise by virtue of the contract of marriage, the same result, for stronger reasons, should follow the loss of the husband's *consortium* by the wife. His care of her whole social life; his protection from injury of her person, of her property, and of her good name, are alike demanded by the marital tie and the first principles of justice. He can not lightly disregard the obligations he has solemnly assumed, or ignore the relation he bears to her to whom he has pledged his affections until the bond is severed by death or the judgment of the law. Although he prove false to his duty, there is no remedy against him like that she now seeks, for compensation in money except for alimony, but we believe she is enabled, under the law as it now exists in Ohio, to ask the same relief for the same causes that would give the husband a remedy against him who should seduce away his wife or persuade her to leave her husband, and afterward harbor and detain her without good cause. The loss of the parties in each case is essentially the same.

Since the enactment of the Code, a new application of legal principles in relation to married women is required of the courts. The twenty-eighth section gives the wife the right to sue for her separate property without joining her husband as co-plaintiff.

By the statute of April 9, 1861, S. & S. 889, is given to the wife all the personal property, including rights in action belonging to her at her marriage, or which may have come to her by descent, bequest, gift, or has been purchased with her separate money, or have grown out of the violation of her personal rights, to be and remain her separate property.

The section of the Code we have referred to was amended by the law of April 18, 1870, authorizing the wife, in all cases relating to her personal estate, to sue as a *feme sole* without the intervention of a *prochein ami*.

Is not the right secured to the wife to recover for a personal injury suffered during coverture to be sustained on the same principle as her claim to protect her separate estate, whether it be real or personal? If it is, can there be any distinction between the rights which grow out of the marital relation and those which attach to mere property? We can not see that such a distinction can be drawn.

Such is the construction given by the Supreme Court of New York to their statutes, which, like our own, have so essentially changed the rights and responsibilities of married women. In *Mann et ux. v. Marsh*, 21 Howard's Pr. Rep. 376, Allen, J., held that these statutes "gave the wife the exclusive right to recover for injury to her reputation as well as her person, and had taken from her husband all control over actions brought to obtain redress by the wife. These injuries are now made a part of her separate estate, and in respect to them she is a *feme sole*."

We can not but feel a deep conviction that the wife is in the highest sense the ward of the court, not because she is now, under the generous policy of our law, relieved from the old idea of conjugal servitude which placed her as a chattel under the control of her husband, but because it is only consistent with the relation into which the parties have entered that each must have their separate interest, controlled only by mutual affection and regard, while subject, nevertheless, to the protection of the law.

There might not be, on the trial of this cause, a right established to recover damages, as the evidence may present a different state of fact than that stated in the petition; but for all the purposes of this case we are satisfied a legal right to recover is found in the pleadings.

Demurrer overruled.

## IDA B. ONG v. WILLIAM SUMNER ET AL.

The clause in the Code, which saves from the statute of limitations married women until after their disability is removed, is constructively repealed, so far as such a suit is concerned, by the subsequent statute giving married women the right to sue alone for personal injuries at any time during coverture.

A woman, married at the time the cause of action accrued, in a suit in her own name for personal injuries, is barred by the statute of limitations as if she were a *feme sole*.

This cause came on to be heard at Special Term on demurrer to the petition. The court below sustained the demurrer, and a writ of error was sued out by the plaintiff to the General Term.

The case appears fully in the opinion.

*E. Colston and Jordan, Jordan & Williams*, for plaintiff in error.

*King, Thompson & Avery*, contra.

STORER, J. This action is brought by the plaintiff to recover damages for a personal injury alleged to have been sustained by her in falling from the stairs of the defendants' sewing machine manufactory, in consequence of the insecure and unskillful manner in which the stairway was built. She states that when the cause of action accrued she was, and still is, a married woman, though the suit is instituted in her own name without the addition of her husband or next friend. The injury happened on March 29, 1866, and the action was brought on August 12, 1870.

The defendants demur, and claim that on the pleadings the cause of action, if any existed, is barred by the statute of limitations. S. & C. 948, sec. 15.

It is urged against the demurrer that she is not precluded, as

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she was a *feme covert* at the time her right of action accrued, and that the saving clause in section 19 is a full answer to the defendants' claim. This clause gives to married women, for rights of action accruing to her, the privilege of commencing suits within the same time after coverture ceases in which she might originally have brought them if *sole*.

If we examine the statute of 21 James 1, cap. 16, which has either been copied into the statutes of the several States of our Union or made the foundation of the statutes themselves, the disability of a *feme covert*, we find, was allowed to extend the limitation as to her, as the consequence of the law which gave to her husband the exclusive control of all her property and rights of action. By his consent alone could an action be brought for a tort affecting the person or property of the wife. He alone was entitled to the fruits of any recovery when the aid of the court was invoked, and he alone could compromise or release the claim. If he declined to interfere the wife was practically without remedy, and unless the statute had saved her right by suspending the course of the limitation until coverture had ceased, her case was hopeless.

In Ohio the thorough changes in the legal relation of husband and wife, as to her property and personal rights, have introduced a new system by which marital obligations and privileges must be governed. The husband can not claim now that the personal injuries of his wife can be sued for, compromised, or released by him alone. He is now, to all legal intent, precluded from interfering with her separate property for his own benefit, and over it has no longer the control.

Thus, the reason of the former extension of limitation on account of disability secured to a *feme covert* has ceased, for she is now the sole mistress of her right to sue for any personal injury, without joining her husband or invoking the aid of her *prochein ami*. She may prosecute her claim to judgment, employ counsel, and become liable for costs, in

the course of litigation, to the same extent that she would be were she unmarried.

The present action is brought in the name of the wife, claiming damages for herself alone. Her husband is not a party, though the petition states that the plaintiff was and still is a *feme covert*. She alone must be regarded as entitled to sue for and recover her damages. As the husband could not appropriate the damages to his own benefit, he could not claim them by action in his own name; his only relation could be that of next friend, and his only liability that of costs; while a late statute permits the wife to maintain her suit in her own name, without the intervention of her *prochein ami*. The wife alone must then be regarded as entitled to prosecute the wrong-doer, as if she were a *feme sole*.

This is the view we take of the law as we find it in the several statutes now in force relating to the rights and liabilities of married women, and this is the construction given by the New York courts to the kindred acts of that State. They hold that the right of the wife to recover for personal injuries exclusively belongs to her; that it is her separate estate, protected from the control of the husband, who is to all legal intent a stranger to the remedy, having no part or lot in the matter; that the husband can not bring the action in his own name, nor in conjunction with his wife; that she is the sole party in interest, and will be protected in the full enjoyment of what in former years would have been for his sole benefit.

We must conclude that the wife is, in contemplation of the law in a proceeding like the present, to be regarded as a *feme sole*, and may ask the same legal or equitable relief as if she had never been *covert*.

But, it is argued, if we have determined rightly the construction to be given to the statutes referred to, still it may be doubted whether the disability does not still exist, as it is not expressly taken away. We admit, as a general rule, the repeal of a former statute should be declared in express



terms ; but where the implication of legislative intention is clearly to be gathered from the words of the statutes themselves, the result must be the same as if the law was repealed in express terms.

"Where the provisions of two statutes are so far inconsistent with each other that both can not be enforced, the latter must prevail. If, however, by any fair course of reasoning the two can be reconciled, both shall stand." These are the words of the Supreme Court, in *Ludlow's heirs v. Johnston*, 3 Ohio, 564, and the same doctrine had previously been held to be the law in *Moore's lessee v. Vance*, 1 Ohio, 10, and subsequently by Hitchcock, J., in *Seymour v. The M. and C. Turnpike Co.*, 10 Ohio, 476, who used this language: "Where a statute is passed which conflicts with, or contradicts, or is inconsistent with a former statute, the latter must have effect and the former be considered as repealed."

How, then, can these statutes be reconciled? If we hold the former is still in force, the wife will be allowed an indefinite period, depending on the life of her husband, to prosecute her claim, when she might have brought her action at the time the injury was sustained, without the let, control, or hinderance of her husband, the law having expressly reserved to her the privilege to sue at any time, without his aid. We have considered the questions involved in the cause very carefully, and consider that the relation of husband and wife existing at the time this action was brought, was controlled by the statute which determines the rights of married women, saving to them the exclusive enjoyment of their separate estate and redress for all personal injury, with power to begin suits in their own name, as if *femes covert*. Hence it follows, if she sues as *feme sole*, she is subject to the same rules of limitation.

The demurrer will therefore be sustained, and judgment entered for the defendants.

TART, J., dissented in the following opinion :

The plaintiff in error was the original plaintiff, her suit

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having been defeated on a demurrer to the petition. The action was for a personal injury sustained by the plaintiff, a married woman, through the negligence of the defendant to keep his premises in a safe condition. The petition showed that the cause of action arose more than four years prior to the commencement of the suit; but it also shows that the plaintiff was a married woman when the cause of action arose, and still remains a married woman.

The demurrer is based upon the statute of limitations:

The suit was brought in the name of the married woman without uniting the husband, under the act of 1870, amending section 28 of the Code (67 Ohio L. 111). This act authorizes such a suit without a next friend. And, by the former act, damages recovered for such a personal injury would be her separate property.

The defendant claims that as the married woman can sue without her husband and without a next friend, the disability of coverture has ceased, and that the statute of limitations ought to run against her as it does against a single woman or a man. The Code, which was adopted in 1853, by section 19, provides that "if a person entitled to bring any action mentioned in this chapter, except for a penalty or forfeiture, be, at the time the cause of action accrued, within the age of twenty-one years, a *married woman*, insane, or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this chapter, after such disability shall be removed."

This is an express exception in favor of a married woman, and saves her right, unless it is taken away by some subsequent legislation. The subsequent legislation which is supposed to take it away is the act which authorizes her to sue in her own name, to enforce this personal right. The argument assumes that the reason why the statutory exception was made in favor of married women, was that she could not sue without her husband; and, as he might refuse to join, she might lose her right from disability.

There is a legal maxim that when the reason of a rule

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has ceased, the rule itself ceases; and it is claimed that that maxim applies to this case. But I do not regard that maxim as sufficient to repeal an express statute. It may furnish a good reason for repealing the statute, but it is to be addressed to the legislature, and not to the court, so long as the statute is in force.

Nor is the subsequent legislation so inconsistent with the provisions in the act of 1853 as to imply a repeal of that provision. Repeals by implication are not favored, and can not be sustained, unless the subsequent act is so inconsistent with the former that both can not have a complete operation. But these two acts can stand together. They do not in any manner interfere with each other. The latter act may furnish a reason why the former one is not necessary, and therefore should be repealed. But it does not prevent the operation of the former, and therefore does not repeal it.

When we have an express, unequivocal statute that a statute of limitations shall not run against a married woman, we can not, as a court, inquire into the reason on which the legislature enacted the statute, in order to determine whether we will regard it. The legislature may legislate away the reason on account of which an act was passed, and yet not repeal the act itself. The legislature could easily have repealed the exception in favor of married women if it had seen fit to do so. As it has not done so, I feel bound to suppose that it was not intended to do so.

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KINNEY PRICE v. ANN SLAUGHTER ET AL.

Where an action is brought for the recovery of lands situated in Ohio, by the plaintiff, who was a slave in Tennessee when the cause of action accrued, and the defendant pleaded the statute of limitations:

*Held*, that slavery was a disability by imprisonment, and that the statute of limitations began to run only when that disability was removed.

Where the plaintiff and cross-petitioners were slaves: *Held*, that no comity

now required a recognition and enforcement by this court of the laws of slave States, which made all slave children illegitimate, and so prevented collateral inheritance among slaves.

*C. B. Simrall* and *L. H. Swormstedt*, for plaintiff.

*H. Snow* and *James S. White*, for Ann Slaughter.

*H. P. Lloyd* and *Tafel & Throop*, for cross-petitioners.

Points made by *C. B. Simrall*, plaintiff's attorney:

1. The property in litigation being within this State, the Ohio laws of descent and distribution must govern in determining who are the heirs or legal representatives.

2. Slavery is such imprisonment as will estop the statute of limitation from running against the plaintiff. *Angell on Limitation*, sec. 192; *Matilda v. Crenshaw*, 4 Yerg. (Tenn.) 299.

3. Slavery, existing under the common law, must be governed by the common law, which permitted "*all persons* to contract marriage except those forbid by canonical laws, prior marriage, want of age, or want of reason." *Blackstone*, vol. I., pp. 433-439. The term "*all persons*" includes slaves, whose ability to contract marriage could be destroyed only by legislative enactments.

4. Slavery being a violation of the Ohio constitution (see Ohio Constitution, sec. 6), and against the equity and policy of Ohio laws, the courts of Ohio can not take cognizance of slavery existing in another State, except so far as they were compelled by the Federal compact respecting fugitive slaves.

5. Legitimacy is always presumed; bastardy must be proved.

6. *Isham Slaughter*, in his will, refers to plaintiff and others as his "*brothers and sisters in slavery*," and leaves the residue of his property to his "*right heirs*." The recognition of plaintiffs and cross-petitioners as his brothers and sisters, is a sufficient description to allow them to take under a devise to "*right heirs*," the laws of Ohio for 1835 having

made the brothers and sisters of an intestate his heirs. Redfield on Wills, part 2, p. 346, *et seq.*; Jarman on Wills, pp. 327, 328.

7. A negro, after he attains freedom, may sue for and recover legacies left to him while he was a slave. *Nelson v. Smithpeter*, 2 Coldwell (Tenn.) 13; *Banks v. Banks*, 2 Coldwell (Tenn.) 546.

Grounds of demurrer made by *H. Snow*, for defendant:

1. Statute of limitations, (not insisted upon in the argument.)

2. Incapacity of slaves to inherit. 5 Cowen, 397; 1 Harris & McHenry, 561; 4 Desaussure (S. C.) 266; 2 Bl. Com. 249.

3. Offspring of slave marriages not legitimate, and, therefore, incapable of inheriting from one another. 1 Bishop on Marriage and Divorce, secs. 154-163; 2 Kent's Com. 253; Story on Conflict of Laws, secs. 79-113.

TART, J. This was an action to recover property situated in Cincinnati, viz: half of lot No. 24, in Ramsay's subdivision, and also lots 25 and 26, in the same subdivision. The petition alleges that the defendant, ever since September 1, 1849, has unlawfully kept the plaintiff out of the possession of said premises. The plaintiff also alleges that the defendant was, in the meantime, receiving large sums from the rents and profits, for which he asks an account. The plaintiff further says that from the time of the accruing of the action until January 1, 1863, he was a slave, held in duress in the State of Tennessee, and unable to bring any action, and asks judgment for the land, and mean profits.

Ann Slaughter, the defendant, demurs to the petition.

There are several persons who have filed cross-petitions, claiming to be brothers and sisters of the plaintiff and of Isham Slaughter, and as such to be entitled to undivided interests in said property as heirs of said Isham Slaughter, deceased, and setting forth the disability of slavery as an excuse for not sooner commencing the action. The cross-petition-

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ers, as tenants in common of the plaintiff, would, in the ordinary course of pleadings in such cases, make themselves co-plaintiffs instead of defendants. The several interests of tenants in common in land are distinct interests, although to be enjoyed in common. But in the present case the plaintiff having claimed all the same interest which these cross-petitioners claim, it is not irregular or improper that they should appear on the record as claiming adverse interests by cross-petitions. If it were not so, and their claims did not conflict, the court would allow an amendment by which these cross-petitions should be co-petitions with the plaintiff.

The defendant, Ann Slaughter, demurs to both the petition and the cross-petitions, upon the ground that their right in the property has been barred by the statute of limitations, more than twenty-one years having elapsed since the death of Isham Slaughter, previous to the commencement of this suit.

But the petitioner and cross-petitioners anticipated the objection, and answered it by alleging that they were under duress as slaves in Tennessee. This we think a sufficient answer to the suggestion of the statute of limitations.

Angel on Limitations, sec. 192, lays down the doctrine that slavery is a disability by imprisonment, and prevents the running of the statute of limitations. It would be a singular instance of legal inhumanity if it did not have that effect. The same doctrine is announced in Tennessee. *Mattilda v. Crenshaw*, 4 Yerger, 299.

The next point made by counsel for the defendant, Ann Slaughter, is that the plaintiff and these cross-plaintiffs appear, by their pleadings, all to have been slaves, and so not able to inherit from Isham Slaughter, their brother, or from each other; that all the children of slaves were illegitimate by the laws of the slave States, and that consequently there could be no collateral inheritance among slaves, as there could be no legitimate brothers and sisters.

The land lies in the State of Ohio, which has never recognized slavery as a legal condition, although under the con-

stitution of the United States it was provided that, "No person held to service or labor in one State, under the laws thereof, escaping into another, should, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due." The State did, by statute, acknowledge its duty under this clause of the Federal constitution to allow "any person held to service in another State under the laws thereof, escaping into Ohio," to be reclaimed. This provision applies to apprentices as well as to slaves, and can not be considered as committing the State to the upholding all the legal consequences of slavery as recognized in the slave States. *Anderson v. Poindexter*, 6 Ohio St. 622; *Commonwealth v. Ares*, 18 Pick. Story's Con., sec. 96, 104. If the slave was permitted by the master to come into this State, the law of this State did not recognize his condition as that of a slave, but regarded him as a free man. We think that the law of Ohio has never taken cognizance of the legal condition of slavery beyond the simple constitutional idea that service might be due from one person to another by the laws of another State, and if so, to the extent only of allowing such person escaping into Ohio to be reclaimed.

Taking these pleadings as they stand, they show that the petitioner and the cross-petitioners were slaves, and under actual duress, but they show that these parties were brothers and sisters of Isham Slaughter. This court will not presume that these brothers and sisters are illegitimate, and so not entitled to the legal rights of brothers and sisters under the laws of descent. We find nothing in the pleadings to warrant any such presumption. Such a state of the law, in Tennessee or in Kentucky, as is claimed by the defendant, Ann Slaughter, must be pleaded before this court can take cognizance of it.

Without reference, therefore, to the will, which was read and commented on at the argument, we hold that the demurrers must be overruled.

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But if it should appear that the parents of Isham Slaughter and his five brothers and sisters lived together as husband and wife, and were so reputed, and these were their children, we should not feel bound to recognize or give effect to any part of the slave code which would make these children illegitimate.

An elaborate argument, with a citation of authorities, was offered to show that the marriage of slaves might be legal and valid; but we do not find any difficulty on this question as the pleadings stand. Legitimacy will be presumed until the contrary is shown. The marriage of the parents would be presumed to have been valid. It was held, in *Stikes v. Swanson*, 44 Ala. 633, where the estate of a freedman was to be distributed, who had been a slave in Florida and afterward removed to Mobile, where he had died, and where cohabitation with his wife was all the evidence which could be produced of their marriage; that at common law a valid marriage would be presumed but for slavery, and that the offspring of such a marriage could not be bastards; that the former decisions were made in the interest of slavery; that the state of the law had changed, and emancipation had now restored to them inheritable blood, and that the estate was distributable to the wife and children as legitimate. 1 Bish. on Marriage, 236-238; Schouler on Dom. Relations, 44, 45; Reeves, 310, 311. And no comity requires us now to recognize or enforce the laws of slavery. *Collins v. America*, 9 B. Mon. 572; *Anderson v. Poindexter*, 6 Ohio St. 622; Story's Confl., sec. 104; 44 Ala. 633.

It is not strictly necessary that we should consider the effect of the will, which is not before us, but the construction of which was contested in argument by consent of parties. But that will was made here in Ohio, where the land was situated; and it follows, from what we have already said, that these brothers and sisters would, in our opinion, answer the description of the right heirs of Isham Slaughter, to whom the will gives the property.



THE SECOND NATIONAL BANK OF CINCINNATI v. R. HEMINGRAY ET AL.

Homans & Co., bankers, of Cincinnati, held several notes of R. Hemingray made in Kentucky, and R. Hemingray & Co., of which R. Hemingray was the principal partner, kept their bank account with Homans & Co. By mutual arrangement of the members of the firm, R. Hemingray did his individual banking business in the name of R. Hemingray & Co., and kept no bank account in his individual name. Homans & Co., while in good credit, without the knowledge of Hemingray, or Hemingray & Co., transferred, by indorsement, his notes to the plaintiff as collateral security for a loan of money, and afterward became insolvent before Hemingray was notified of the transfer. Hemingray & Co. had on deposit with Homans & Co. \$10,000, which R. Hemingray was authorized to use to pay his notes, one of which was due in July, 1869.

*Held*, that the notes being Kentucky paper, and subject to Kentucky law, were subject to set-off in the hands of the plaintiff in like manner as if they were in the hands of Homans & Co.

That separate and joint claims can not ordinarily be set off against each other, either at law or in equity, but that where there is a natural equity in favor of such a set-off, and the separate party becomes insolvent, equity will, to protect such natural equity, permit a set-off to the extent of the interest of the partner in the joint claim.

*Held*, also, that when there is superadded a course of business, showing that the parties treated the joint claim as the individual property of the partner who seeks to make the set-off, or when there is a contract or an understanding to that effect between the parties, such set-off will be permitted.

That a check by R. Hemingray & Co. for a part of their deposit account to R. Hemingray, made on the day of the failure of Homans & Co., but before notice of the transfer of his notes to the plaintiff, was valid to vest the fund in R. Hemingray, so that he could set it off against his notes in the hands of the plaintiff, notwithstanding Homans & Co. were then insolvent and afterward were declared bankrupts, and that Homans & Co. being insolvent, R. Hemingray will be allowed to set off said fund against the notes not due as well as against the note which was due.

RESERVED FROM SPECIAL TERM.—This is a suit brought by the Second National Bank upon the following note:

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Second National Bank of Cincinnati v. Hemingray et al.

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“\$4,000.

COVINGTON, KY., July 11, 1868.

“One year after date I promise to pay B. Homans, Jr., or order, four thousand dollars, value received, with interest.

(Signed,) “ROBERT HEMINGRAY.”

(Indorsed,) “B. Homans, Jr.”

This was one of four notes given by Hemingray to B. Homans, Jr., for a house and lot in Covington—one for \$5,000, payable in three months, and the three for \$4,000 each, payable in one, two, and three years, secured by mortgage. The note for \$5,000 had become due, and had been paid to Homans by a check of R. Hemingray & Co. The plaintiff having brought the suit upon the first of the three \$4,000 notes, the defendant Hemingray, by his answer and cross-petition, set out the whole transaction, and sought to establish a set-off against the note sued on, and also against the other notes which were not due.

These notes were all made in Kentucky, and of the same form as that which has been recited.

On the 31st day of May, 1869, Homans transferred these, with other notes, to the plaintiff as collateral to his own notes given for a loan of \$20,000. This transaction was unknown to the defendants.

When the first note for \$4,000 was about to become due, Richard Evans, a partner and the cashier of the firm of R. Hemingray & Co., on behalf of the firm called upon Homans, and said that it would be convenient to have a few days delay in the payment of that note as they were building, and offered to take up the old note and give a new one, or if he required it, to pay the note. Mr. Homans consented to the delay of payment, but preferred to let the old note lie, and to consider it as a loan on call, but said nothing of the assignment of the notes to the Second National Bank.

*Tafel & Throop and Lincoln, Smith, Warnock & Stephens,*  
for plaintiff.

*W. E. Jones and Matthews, Ramsey & Matthews,* for defendants.

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Taft, J. This case was before this court at a former term, when it was determined that the statute of Kentucky, where the notes were made, restricted their negotiability, so that they were liable to the same defenses as they would have been subject to in the hands of the payee, B. Homans, Jr. After that decision the case was remanded to Special Term, and was heard upon the evidence. The contest turned upon the question whether R. Hemingray had any actual claim to set off against Homans. A statement of the evidence was made and certified, and the case reserved for the three judges. The court do not propose again to go into the question of the negotiability of the notes. It is an important question, and has been differently decided by different courts, and, though a proper question to be considered by the court of last resort, it would not be profitable for us now to reconsider it. These notes, then, we hold to be Kentucky contracts, and still subject to all the equities which the defendant had against the payee or any assignee before notice of the assignment. Upon examination of the evidence, we think it is proved that the checks of Hemingray & Co. to R. Hemingray for \$9,425.89, as well as that of Captain Evans for \$1,800, were given to R. Hemingray, and brought to the notice of Homans before Hemingray knew of the transfer of the notes to the plaintiff, and before the general assignment to Cook for the benefit of creditors, but not before he knew of the insolvency of Homans & Co. The transfer of the notes to the bank had been made before the first four thousand-dollar note was due, and not only was no notice of the transfer given to Hemingray, the maker, but even the bank notice of the note becoming due, which would naturally have disclosed the holder of the note, was so given as to avoid the communication of that information. It was objected that the check of R. Hemingray & Co. did not cover the entire deposit, and that it, therefore, did not transfer the fund without the consent of B. Homans & Co.

This court, in the case of *McGregor v. Loomis*, 1 Dis.

247, has laid down the rule that the whole, or any part of a fund on deposit with a banker may be assigned and transferred by the check of the depositor, so as to constitute a set-off in favor of the holder of the check against his note in the hands of the banker. We see no reason to question this rule, but believe it to be in strict conformity with the contract of the banker, who receives moneys on deposit, to be drawn out by his customers as they want them. This contract, if not expressed, is implied from the manner in which such funds are uniformly dealt with by both the bankers and depositors. In short, this principle is an essential element in the system of banking upon deposit accounts.

If, then, the checks were not invalidated by the fact of insolvency, nor by the bankruptcy, the deposit accounts transferred by the checks would be available as a set-off against the notes of R. Hemingray.

Before considering the bearing of the insolvency and the bankrupt act upon the transfer by check of the deposit account, we will consider the case as it stands on the natural equities.

It is a general principle, both at law and in equity, that a partnership account can not be set off against a separate liability, notwithstanding the natural equity in favor of the set-off, to the extent of the interest of the partner in the partnership account. The separate liability and the joint claim are not regarded as mutual, and the policy of the law is to avoid confusion, by requiring such claims to be enforced by distinct and separate legal or equitable proceedings. But, when a firm holds a liquidated claim against a creditor of one member of the firm, and the natural equity in favor of such member, to have his share of the partnership claim set off against his individual creditor, is about to be lost by the insolvency of his creditor, such insolvency has been held to be a reason for the interference by a court of equity, to ascertain the extent of the partner's

interest in the partnership claim, and allow it to be set off against the claim of his insolvent creditor.

R. Hemingray was the principal member of the firm of R. Hemingray & Co., owning five-eighths of the stock, while Evans owned three-sixteenths, and Foley three-sixteenths only, and were also indebted to R. Hemingray \$3,800, on account of the purchase of their interest. Now, here was a clear natural equity in favor of the set-off, at least to the extent of R. Hemingray's five-eighths interest, in the deposit account, which might exceed the amount of the first four-thousand dollar note.

But there are other circumstances which are disclosed by the evidence, and which are to be considered.

R. Hemingray kept no other individual bank account than that which was kept in the name of R. Hemingray & Co., and, by agreement of the other members of the firm, he used the firm bank account for his individual banking transactions.

One note of R. Hemingray, for \$5,000, had matured, and Mr. Evans, the cashier of the firm, had paid it with the firm check. Evans, on behalf of the firm, applied to Homans to have a few days' extension of the note on which this suit was brought, and offered to pay the interest and give a new note, but Homans said it might lie as it was, and be regarded as a loan on call.

Homans told both Evans and Hemingray, after it was known that he had failed, and when he informed defendant (Hemingray) that the notes were in the hands of the plaintiff, that the deposit account was safe, and could be set off against the note, as they were not negotiable. He further testifies that he did not "have a clear distinction between R. Hemingray and R. Hemingray & Co." It is obvious that Homans made no actual distinction between R. Hemingray and the firm, and regarded the deposits by the firm as belonging to R. Hemingray, for the purpose of meeting these notes. He testified that if the firm had attempted to withdraw the entire deposit after one of the

notes had fallen due, without paying it, he should have objected, and prevented it if he could. He, at the same time, testified that he supposed they would have had the right to withdraw the entire deposit.

Meantime these notes had been transferred to the plaintiff, without notice to the defendant. Homans knew that this fund was designed to pay the notes; Homans knew that the notes were not negotiable, and yet he had attempted to negotiate them. He knew that if he informed the defendant or Hemingray & Co. that he had transferred them, this fund would be withdrawn. He withheld this information, which was very important to the defendant, and which, we think, under the circumstances, good faith required that he should communicate.

The question is, whether, under these circumstances, Homans ought to be permitted to defeat the application of this fund to the payment of these notes by way of set-off.

We think that, clearly, he ought not to be permitted to defeat the set-off against the note which was due. We come to this conclusion independently of the checks.

In Waterman's work on Set-off, section 384, and in the note, are stated the circumstances which will induce the court to permit joint and separate demands to be set off against each other; and the leading cases are there cited.

The right was admitted in *Downam v. Matthews*, Prec. Chan. 580, "upon the course of dealing;" in *Jeffs v. Wood*, 2 P. Wms. 128, upon the fact of the legatee having omitted to credit the executor with the goods supplied. The master of the rolls said, "It is against conscience that A. should be demanding a debt against B., to whom he is indebted in a larger sum, and would avoid paying it." "However, it seems the evidence of an agreement for a stoppage will do; and in these cases equity will take hold of a very slight thing to do both parties right."

But this consideration does not seem to apply to the two notes which were not due. It is hardly to be presumed that this fund was designed to meet payments which would

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not be due for one and two years afterward. And in determining whether the set-off shall be allowed against the last two notes, it will be necessary to consider the effect of the checks.

We come now to consider the effect of the checks which were given to R. Hemingray on the afternoon of August 26, 1869. Homans & Co. had stopped payment between twelve and one o'clock. Very soon the report came to Hemingray & Co. They immediately consulted, and made their check for \$9,425.89, which they supposed to be the entire amount of their deposit, to R. Hemingray. They afterward discovered that there was still a balance of \$266.30, by reason of a collection of which they had not been advised, and they gave an additional check for that amount. Evans also gave his individual check to Hemingray for \$1,800, which stood to the individual credit of Evans with Homans & Co. R. Hemingray went with the two checks first made, viz: that of R. Hemingray & Co., for \$9,425.89, and that of Evans, for \$1,800, to the bank of Homans & Co., and it was shut. Afterward, between four and five o'clock, the same afternoon, he found Homans in Covington, and advised him of the checks, and was then informed that the notes had been transferred to the plaintiff. Between seven and eight o'clock the same afternoon, Homans, who was the only member of the firm of Homans & Co., made a general assignment to Theodore Cook for the benefit of his creditors. A few weeks afterward he was forced into involuntary bankruptcy.

We do not regard the transfer by check of these deposit accounts as preferences by Homans, to defraud creditors, within the 35th section of the bankrupt act, which forbids transfers by the bankrupt after the act of bankruptcy; nor does it fall within the enumeration of acts which are designated in the 39th section of that act, as acts of bankruptcy.

The contest is between the plaintiff and R. Hemingray. Although Hemingray has seen fit to make the assignees in

bankruptcy parties, they have set up no claim. If the answer and the evidence had showed that the assignees were entitled to the notes, by reason of an act of bankruptcy, before the notes were transferred to the plaintiff, making the transfer void, then there would arise a question between the assignees, who might claim the notes, and the defendant Hemingray. But the evidence fails to impeach the title of the Second National Bank to the notes. The bank holds the notes *bona fide* as against the assignees in bankruptcy, and subject only to such equities as Hemingray had at the time he was notified of the transfer; the assignees can have no interest in the controversy. The contest is between the bank and Hemingray only.

The only way in which the plaintiff could avail itself of the bankrupt act to defeat the defendant's right of set-off, would be to admit and prove that it held the notes in fraud of the bankrupt law, and that they, therefore, belonged to the assignees in bankruptcy. Then, as Hemingray knew of the insolvency of Homans when he took the checks, he might not be allowed to set them off against the notes in bankruptcy. But we think that the bank has shown a good title to the notes, notwithstanding the attempt by the defendant, in his answer, to impeach it. As the title to the notes is in the bank, and not in the assignees in bankruptcy, the contest of the defendant is with it, and not with the assignees. If, on the other hand, the answer of the defendant had proved true, and the notes had fallen into the hands of the assignees in bankruptcy, the defendant might have a more difficult task to bring himself within the meaning of section 20 of the bankrupt act, which provides for mutual debts and set-off under that act. *Smith v. Hill*, 8 Gray, 572. As we have said, Hemingray had reason to believe that Homans was insolvent when he took those checks, and if he were to set them up against the other creditors, so as to get his pay in full, it would be an unjust advantage over the general creditors by a purchase of a claim made after an act of bankruptcy. But here



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the general creditors are not injured or defrauded of any rights. So far as this deposit account is settled by way of set-off against these notes, held by the plaintiff, the assignees in bankruptcy are relieved from any obligation to pay dividends upon it.

Objection has been taken to the transfer of these deposit accounts, especially to that of Richard Evans, that they were not absolute, and did not make Hemingray actual owner of the fund. The transaction was rather sudden, and without much negotiation as to the consideration to be paid, or the price. But we are satisfied that it was the purpose of both Hemingray & Co., and of Richard Evans, to transfer to Hemingray all the title they had. As to the price of the checks, they might have relied upon their legal right to compensation, or they might have relied upon the justice of Hemingray. They were not unwilling to transfer it to him without reserve, and we think they did so, and that this title was complete.

Our conclusion is, that the checks of R. Hemingray & Co., except the check for \$266, which was not given till after notice of the transfer of the notes to the plaintiff, and the check of Richard Evans, were valid and available in the hands of R. Hemingray as a set-off against these notes in the hands of the Second National Bank of Cincinnati.

The insolvency of Homans is a sufficient reason for allowing a set-off against the notes not yet due.

There is another item of money collected by Homans & Co., upon a note of Allen belonging to R. Hemingray individually, and not included in the balance of R. Hemingray & Co.'s deposit account as above stated. This item is a proper subject of set-off by R. Hemingray, although it also was deposited for collection in the name of R. Hemingray & Co.

A judgment may be entered in accordance with this opinion.

THE GLOBE INSURANCE COMPANY OF CINCINNATI, Plaintiff in Error, v. ELIZABETH W. BOYLE ET AL., Defendants in Error.

Action on policy of fire insurance, issued to "E. W. B., executrix," on property devised in equal moieties to the testator's children, and E. W. B., his widow and executrix. It was proved that the underwriter was informed that the policy was to be for the benefit of the estate of the deceased.

*Held*, that evidence to explain the object of the application for the policy, and the manner of its issue was admissible, not to vary the contract, but to aid the court in interpreting its true meaning.

That E. W. B., in her capacity as trustee for creditors and devisees, had, as executrix, an insurable interest in the whole property.

That under the Code, alternative relief may properly be asked in a petition and granted by the court.

**GENERAL TERM.**—Error to Special Term to reverse the judgment rendered there against the plaintiff in error, who was the defendant below. The facts on which the judgment below was rendered were as follows:

In 1865, Stephen S. Boyle died, seized of four warehouses, numbers 53, 55, 57 and 59, on Columbia street, Cincinnati, between Sycamore street and Broadway. By his last will he made his wife, Elizabeth W. Boyle, executrix, and devised one-half his realty to her and the other half to his children. The wife and children together were the plaintiffs. On the 8th day of January, 1866, a policy of insurance against fire was issued by the defendants to the plaintiffs, in the name of "Elizabeth W. Boyle, executrix," on the above property. It was proved that the vice-president of the insurance company who took the risk was told, when the application was made to him, that the policy was for the benefit of the estate of the deceased. This policy was afterward renewed, and after the renewal the premises were destroyed by fire.

The defendant having declined to pay the loss, on the ground of want of insurable interest in Mrs. Boyle as executrix, this action was brought.

The original petition was demurred to, and the demurrer

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sustained by the court, with leave given to amend the pleading. An amendment was made, setting forth the facts as stated, alleging Mrs. Boyle's interest as trustee for the creditors and heirs of the deceased, as well as her interest and that of her children under the will. To this amendment a demurrer was also filed, which was overruled.

The defendant then answered, denying generally its liability, and claiming that it had insured only the interest of Mrs. Boyle, and not that of her children.

On the trial at Special Term, on submission, judgment was given for the plaintiffs, the court finding the facts as stated, and that the plaintiffs were entitled to recover the whole insurance, which was assessed at \$11,816.34.

A motion for a new trial was made and overruled, and a writ of error taken to General Term, to reverse the finding and judgment of the court below.

*Cox, Burnett & Follett*, for plaintiff in error.

*Hadly & Johnson and Lincoln, Smith, Warnock & Stephens*, contra.

STORER, J. Two questions, it appears to us, if carefully considered and answered, must decide the controversy between the parties.

First. May we not receive evidence to explain the object of the original application for the policy, as well to indicate the extent of the risk, as also to show what the contract between the parties really meant, and what the underwriter must have understood it to mean?

The rule as to this point has been very clearly laid down by our Supreme Court in *Hildebrand v. Fogle*, 20 Ohio, 147, and since recognized in a number of cases which we need not refer to. "In expounding a written instrument, the attendant and surrounding circumstances are competent evidence for the purpose of placing the court in the same situation and giving it the same advantages for construing the instrument as the parties possess who executed it. The object or tendency of this evidence is not to controvert or vary the

terms of the instrument, but to enable the court to have an enlightened understanding of the subject matter in reference to which it has been used."

This is but the exposition of the law as it is now recognized by the English and American courts, and does not trench upon the general rule that an instrument can not be explained by parol testimony. It merely places the litigants before the court, occupying the same position they sustained to each other when the contract was made. And this principle is applied most liberally when we are called in to interpret a policy of insurance, otherwise it would be difficult, if not impossible, in many cases, for the real parties in interest to recover, as when the insurance is made in the name of another as agent or broker, or by any party for whom it may concern, dependent upon the subsequent assent of the true owner to the contract.

Applying this rule to the case before us, we find it proved that when the application for the risk was made by the agent of Mrs. Boyle, the underwriters well knew that the property to be insured had belonged to her husband at his decease, and that they were particularly advised that the object of the insurance was to secure his estate from loss. Moreover, Mrs. Boyle, under her husband's will, was devisee in fee of a full moiety of his real estate. It was also proved that the agent who applied to the underwriters was given a slip of paper upon which was written "Elizabeth S. Boyle, executrix," and this he handed to the vice-president of the company, by whom the description of the party insured was inserted in the policy; that when the first policy expired it was renewed for the same premium and in the same manner as we find the original was made. A year of insurance had then elapsed, and a second risk is assumed after premium paid, without any exception to the right of Mrs. Boyle to insure the interests she represented; and when the buildings are consumed she is told, for the first time, she had no insurable interest at stake.

We are pressed now with the question, was the contract

between the parties made in good faith, and as the name of the wife of the former owner alone is described, did the insurer intend to cover the property in the policy against loss by fire to the full extent of the sum insured?

It is obvious to us, if we do not answer the question in the affirmative we must regard the agreement as "*nudum pactum*," having the semblance of a contract but in reality of no value, while the assured, during the whole term of its existence, honestly depended on it for her security, and the insurer, by his silence, intimated no doubt of its validity. If the word "executrix," added to Mrs. Boyle's name in the policy, is rejected, she still had an insurable interest as devisee, while if retained we may resort to parol evidence to prove of whose last will and testament she was executrix; and it necessarily follows, upon the testimony in the record, that the underwriters were fully advised for whose benefit she was acting. She was, by virtue of her appointment, invested with a trust which extended to the protection of the testator's entire estate. In case it had become necessary to subject the realty to the payment of debts, the equitable lien of the creditors, which our law upholds, might very properly be regarded as an insurable interest under the acknowledged rule, that it is not essential that there should be a direct personal interest in the subject insured; but, on the contrary, it may be an interest in its preservation only. Such we believe, from the proof in the case, was the understanding of all the parties when the contract was made.

But it is urged that the executrix, as such, has no interest within the rule we have just laid down that can be protected by insurance, and that there is no liability therefore upon the policy. Technically speaking, her power is limited generally to the administration of the testator's personalty; but connected with the statement of the agent, made to the defendant at the time the risk was taken, we are satisfied the estate of the testator was represented as the real subject at risk, and the underwriters were willing to insure it, and we can not permit what we must believe was the

*bona fide* expectation and understanding of the parties at the inception of the contract, at this late day to be disappointed by technical objections, which we may fairly infer were not in the mind of the assurer until called upon to indemnify the assured for her loss.

We need not multiply authorities upon this point, though we find very analogous cases decided by courts of the highest authority, when the principle we have stated has controlled their decisions. *Routh v. Thompson*, 13 East, 274; *Herkimer v. Rice*, 27 N. Y. 179; *Colburn v. Lansing*, 46 Barb. 37; *Phelps v. Gerhard Insurance Co.*, 9 Bosworth, 410; *Bidwell v. N. W. Insurance Co.*, 19 N. Y. 182; *same case*, 24 N. Y. 303; *Shawmut Sugar Co. v. Hampden Insurance Co.*, 12 Gray, 540; *Vairin v. Canal Insurance Co.*, 10 Ohio, 223.

We feel that we violate no legal principle in our decision upon this point, which involves in reality the merits of the whole controversy; and our decision would lead, if we held otherwise, to a manifestly unjust and inequitable result.

The second question which arises in the controversy before us is, whether the relief asked by the plaintiff is not rather the reformation of the contract than a direct judgment upon it as it is now presented. To this we may well answer, that in every case where a reformation of the instrument is necessary, we may, in the same action, reform it and adjudicate finally upon the merits. This avoids circuitry of action, and yet enables the parties to litigate to their full extent their several claims.

But no such decree, we think, is necessary. Though alternative relief is asked in the petition, we are not bound to consider every claim arising out of the same matter, if we can, satisfactorily to ourselves, on legal principles, find authority to determine the rights of the parties by a fair construction of the contract itself and thus settle the controversy. Hence, it is no objection to a petition that the plaintiff asks alternative relief. *Young v. Edwards et al.*, 11 How. Pr. 202; *Landon et al. v. Hepburn*, 3 Sand. 668. It is also held, under the New York Code, of which our own

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is nearly a copy, that after answer filed, any relief consistent with the frame of the issue, and irrespective of the prayer, may be granted. *Jones et al. v. Butler*, 20 How. Pr. 189; *Marquat v. Marquat*, 12 N. Y. 841; *Emery v. Pease*, 20 N. Y. 62. We adopt these decisions as a just exposition of the practice in cases like the present. It divests the question raised by counsel of all difficulty, and enables us to look at once at the real points at issue, which, as we understand them, are but these: Did the parties enter into a contract, fully understanding its object; was the plaintiff acting for the estate of the testator; did the policy cover both the interests of his widow and his heirs, and is the defendant therefore legally bound to indemnify them for the loss they have sustained?

Having carefully considered the evidence contained in the record, we have no difficulty in deciding in favor of the plaintiff, and her right to recover.

The judgment at Special Term will be affirmed.

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 ANN SMITH v. SARAH A. HANKINS ET AL.

A. conveyed to his son B. (who was the husband of the plaintiff) and his heirs a house and lot, "to have and to hold the same to the said B. during his natural life, and after his death to his heirs forever; provided that if the said B. should die without children, then the property was to revert to and vest in the heirs of A., the grantor herein." B. had seven children, but survived them all, and also survived his father A.

*Held*, that B. took under said deed but a life estate, with a remainder in fee to his issue, subject to the condition that if he died without issue living at his death, the estate should revert to the heirs of A., and that on the death of B., the plaintiff, his widow, took no estate from her husband, either as heir or as widow.

*J. R. Von Seggern and King, Thompson & Avery*, for plaintiff.

*S. S. Carpenter and Jordan, Jordan & Williams*, for defendants.

TAFT, J. This suit was brought to recover real estate. The plaintiff is widow of Thomas B. Smith, deceased, who was the son of John Smith, late of Cincinnati, deceased, and the defendants are the children and heirs of said John Smith. The question of title turns principally upon the construction of a deed of John Smith to his son, Thomas B. Smith, made May 9, 1850, whereby, in consideration of \$1,625 to him paid, and in further consideration of natural love and affection, "John Smith sold, granted, and conveyed unto the said *Thomas B. Smith and his heirs* the following described real estate" [describing it], "to have and to hold the same to the said Thomas B. Smith during his natural life, and after his death to his heirs forever; provided that if the said Thomas B. Smith shall die without children, then and in that event the property hereby conveyed is to revert to and vest in the heirs of the said John B. Smith, the grantor herein." Thomas B. Smith had seven children, but they all died in his lifetime, so that he died without children. *Parrish v. Ferris*, 6 Ohio St. 563; *Niles v. Gray*, 12 Ohio St. 320.

For the plaintiff, it is claimed that the deed conveyed to Thomas B. Smith a fee-simple estate. It is not denied that the *habendum* clause and the condition limit the interest to a life estate, or to a qualified fee, liable to terminate on the death of Thomas B. Smith. But it is claimed that the granting clause gives a fee, and that the *habendum* clause is repugnant to it, and must be rejected; and that on the death of Thomas B. Smith without children, the plaintiff, as his wife, inherited the fee, under the statute law of Ohio.

The defendants, on the contrary, claim that this deed is to be considered as a whole, in order to ascertain what was the intention of the grantor. And that, taking it up by the four corners, it appears that the grantor intended to convey only a life estate, or else a fee simple, determinable on the death of Thomas B. Smith without children, so that



when Thomas B. Smith died the estate passed by this deed directly to the issue of John Smith.

We think the construction claimed by the plaintiff can not be sustained. We are satisfied that the grantor intended either to limit the estate to the natural life of the grantee, remainder to his children, or to give him a fee, qualified with the condition that if he died without issue, the fee should go to the heirs or issue of John Smith. It may not be material to the issues in this case which of these two last-mentioned constructions we put upon this deed. Nevertheless, we incline to the opinion that the grantor intended a life estate only to Thomas B. Smith, with remainder in fee to his issue, and if he should die without issue, a reversion to the heirs of John Smith, the grantor. As John Smith died before Thomas B. Smith, we are not embarrassed with the question, who were the heirs of John Smith while living. But if that question were to be decided, we think that the obvious intention of the grantor was that the estate should revert to such issue of John Smith as should be alive when Thomas B. Smith should die without issue living. The subsequent conveyances and the will of Thomas B. Smith were not such as to give the plaintiff any title. They concerned only the interest conveyed by the original deed from John to Thomas B. Smith. But the transactions subsequent to the original deed are all better explained by the theory of a life estate than by that of an absolute fee simple in Thomas B. Smith.

We find no such repugnancy between the granting and the *habendum* clause as to justify us in rejecting the latter, or between the granting clause and the condition, as to warrant our rejecting the condition. It was not unusual in early cases to sustain a restriction by the *habendum* of the fee simple, expressed in the granting clause, to a fee tail; and nothing was more common than to qualify the term heirs in the granting clause, by a condition that, if the

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grantee should die without issue, there should be remainder over to some other devisee.

We see no reason why the term "heirs" in the present case might not be explained in the *habendum* and condition which followed, so as to show that the grantee took but a life estate. Such, we think, is the effect of the language used.

The granting clause gives a general description of what was intended as a conveyance of the property to Thomas B. and his heirs. This was explained to mean that he gave to Thomas B. a life estate, and to Thomas B.'s heirs a fee; but if he should have no lineal heirs surviving him, the estate should revert to the surviving issue of John Smith, the grantor.

Taking the whole instrument together, we are satisfied that this was the intention, and we find no rule of law, or decisions of the courts, to prevent our carrying out that intention. *Roberts v. Dust*, 4 Ohio St. 502, 505; *McCoy v. Bizby*, 6 Ohio, 310-313; *Ewing v. Burnet*, 11 Pa. 41; 2 Greenl. Cruise, tit. 37, ch. 20, p. 297; *Parkhurst v. Smith*, Willes, 332, 333; *Wolf v. Scarboro*, 2 Ohio St. 361; *King v. Beck*, 15 Ohio, 564; *Fearne on Const. Rem.* 373; *Deering v. Longwharf*, 25 Me. 51; *Jackson v. Ireland*, 3 Wend. 99; *Prior v. Quackenbush*, 29 Ind. 475.

If, however, we were wrong in holding that the estate of Thomas B. was a life estate only, it is clear to our minds that it was qualified as a fee, by the condition that if he should die without children, the property should revert to the heirs of John Smith, the grantor; so that when Thomas B. died without issue living, the estate went, by the limitation in the deed, to the issue of John Smith, and left nothing to the plaintiff by way of inheritance or of dower.

## WADE v. POLLOCK &amp; REYNOLDS ET AL.

where A., B., and C. enter into a tripartite contract by which A. agrees to do one thing and B. agrees to do another thing, in both of which C. is interested, and C. agrees to do one thing in which A. is interested, and another in which B. is interested, and A. tenders performance, C. can not set up as a defense against his obligation to perform that in which A. is interested, the fact that B. failed to perform his contract. In such a contract the promise of each must be regarded as made in consideration of the promises of the other parties, so that either party, who is not himself in fault, may require the performance by each other party.

This suit is brought to enforce specific performance of a contract on the part of the defendants, the heirs and devisees of Pollock and of Reynolds, by requiring them to pay an amount of money which Pollock & Reynolds undertook to pay Wade, the plaintiff, by the following contract:

“Nehemiah Wade agrees to cancel the present lease on lot 177 in plat A of Wade’s subdivision, being 146 feet on Liberty street by 184 feet deep to Melancthon street, in Cincinnati, with August Lankswiest and John Weil, and make a new lease of same, to be a perpetual lease, on the terms of his letter, dated December 3, 1869, to said John Weil, *i. e.*, at a rent of \$600 per year (the same as before, in amount and terms), up to August 1, 1870; then at \$1,022 per year, in quarterly installments, in advance, until August 1, 1877; then at \$1,752 per year, in quarterly installments until August 1, 1885, when a new appraisement or valuation shall be made, in the manner specified in said letter, and likewise each recurring fifteen years, perpetually, the rent thereafter to bear the rate of six per cent. per annum, in quarterly installments. Said new lease to be made to Samuel Pollock and Jabez Reynolds, and delivered to them on February 1, 1870, upon their paying to said Wade or his attorneys the ascertained balance now due by said John Weil to said Nehemiah Wade, and upon

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which two suits have been brought in the Superior Court of Cincinnati against said John Weil and Frank G. Rhein, to wit: the sum of about \$1,634.26, with interest thereon from the date sued on until said February 1, 1870, on said 1st day of February, 1870, and in addition the quarter's rent, in advance, then due, of \$150. And the said Samuel Pollock and Jabez Reynolds, Jr., agree to pay said sum of money and join in the execution of said lease, and the said John Weil and Frank G. Rhein agree to sign and execute all papers necessary to convey and release said title now in them.

"Witness our hands and seals, this 23d December, 1869.

(Signed,)

"N. WADE, [SEAL.]  
POLLOCK & REYNOLDS, [SEAL.]  
JOHN WEIL, [SEAL.]  
"Agent for F. G. Rhein."

Attest: "RICHD. H. COLLINS."

The property was at the time subject to a lease from Wade, with seven or eight years to run, which was held by Rhein and Weil, or by Rhein, who was represented in this transaction by Weil as his agent.

Rhein & Weil had a negotiation with Pollock & Reynolds to sell and transfer to P. & R. their leasehold interest, in which Pollock & Reynolds required that the old lease should be canceled by Wade, and a new one granted, to be perpetual, on the terms stipulated.

The petition shows that Wade was ready, and had offered to cancel the old lease and execute and deliver the new one, and that he did tender such a lease to defendants.

Pollock is dead, and his devisees are parties in his stead, together with Reynolds. They answer and say, as one defense, that the old leasehold is so incumbered that a clear title can not be made to them, and that one-half of said leasehold is actually held by Lanksweist, one of the original lessees; and they claim that for that reason Wade can not perform his part of the contract, so as to entitle him to ask performance by them.

To this the plaintiff demurs, and sustains the demurrer in argument, by claiming that he is ready to do all he undertook to do, which was to make a perpetual lease, and to cancel the old lease, both of which he is ready to do; that he never undertook for Weil, or Rhein, or Lankswest. The question is, whether one of the parties to a tripartite contract can set up in defense against the action of another, that the third party has failed to perform his part of the contract.

It appears from the petition and the averments of the answer to which the demurrer is filed, that the plaintiff has been in no manner in default, and is entitled to a specific performance, unless the default of Weil & Rhein is a reason for depriving him of that right.

*Stallo & Kittredge*, for plaintiff.

*J. Burnet. H. Snow*, and *R. H. Collins*, for defendants.

TART, J. It appears to us that where three enter into a tripartite contract, each to perform acts valuable to the other two, and if two of the three parties fail to perform their respective parts, they may both be compelled to perform, or pay damages at the suit of one who performs or tenders performance. This rule would sustain the action of the plaintiff in the present case, unless he has by the contract so undertaken for the performance on the part of Weil & Rhein as to be responsible to Pollock & Reynolds for the failure of Weil & Rhein. This question turns upon the construction to be put upon the terms of the contract. By the construction we put upon this contract, the plaintiff did not undertake for the title to the old leasehold estate, except that he would cancel the lease, and grant a new one, which should be perpetual; and we understand the allegations of the petition to show that Wade is willing and able to do all that he has contracted to do, and has tendered the performance. The demurrer will, therefore, have to be sustained.

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Raymond v. Moore, Wilstach & Co.

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## RAYMOND v. MOORE, WILSTACH &amp; CO.

Gunn, in 1830, procured a copyright for, and published, "Gunn's Domestic Medicine and Poor Man's Friend; in 1838 he sold and transferred one-half his interest to Raymond, in trust for Raymond's wife and children, covenanting that he would not transfer it to any one else, and that he would prepare a larger edition, which Raymond was to publish at his cost; but the profits were to be equally divided, and so of every new edition of the work. In 1858, Gunn, having prepared another edition, under the title of "Gunn's New Domestic Physician and Home Medicine," sold it to the defendants with the knowledge, but without the consent of Raymond, and the defendants, in 1858, published the work, and continued to print and sell it till 1870, when Raymond brought suit to compel them to account to him for one-half of the profits of the publication.

*Held*, that when a party claims to hold another as a trustee of personal property, under a mere constructive and not an express trust, of which he had notice, he must assert the claim within four years from the time when the trust is alleged to have originated, in analogy to the statute limiting actions for the detaining of personal property, and that this action is, therefore, barred by lapse of time.

*E. L. Anderson*, for plaintiff.

*Hoadly & Johnson*, for defendants.

**TAFT, J.** This is a suit brought to compel the defendants to account to the plaintiff for one-half of the profit made by them in the sale of "Gunn's Domestic Medicine and Poor Man's Friend."

In 1838, Dr. John C. Gunn obtained a copyright for a book compiled by him, under the said title. His copyright was procured in the Eastern District of Tennessee. One-half of his interest in this work Gunn sold and transferred to Raymond, in trust for his wife, Margaret, and their children. This transfer, however, comprised but a part of the territory of the United States; and in the contract of sale Gunn agreed to furnish matter for another edition of a larger size. Matter for such new edition was furnished

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Raymond v. Moore, Wilstach & Co.

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by Dr. Gunn, and published by the plaintiff, Raymond, under the title of "Gunn's Domestic Medicine; or, Poor Man's Friend in the House of Affliction, Pain, and Sickness; Raymond's Edition."

This work was conveyed to Raymond, in trust for the wives of Gunn and Raymond, respectively, and their children, by deed, dated November 14, 1839. It had been copyrighted in Philadelphia the same year. The agreement of 1838 had conveyed Dr. Gunn's interest in the first book, and all future editions, which Gunn was to furnish material for and correct, and Raymond was to publish and sell.

The plaintiff claims that this contract bound Gunn to give Raymond, in trust, the benefit of any future edition of the work.

In 1842, the interests of the wives of Gunn and Raymond in the work were, by agreement, severed, so that each should have a separate interest, to be taken care of by her separate trustee.

The sale and the joint or several enjoyment of the profits went on for about twenty years, till 1858, which was twenty-eight years from the issuing of the original copyright; when Dr. Gunn, having prepared the material for a new edition of the old book, or a new work, procured another copyright, under the title of "Gunn's New Domestic Physician; or, Home Book of Health," and with an imprint as of the 100th edition. This book and copyright Gunn sold to the defendants, who have from 1858 to the present time published and sold it. The plaintiff claims that this is merely a new edition of the "Domestic Medicine and the Poor Man's Friend," and that the sale and transfer to the defendants was a violation of the plaintiff's right under his contract with Dr. Gunn, and that the defendants took the new copyright with knowledge of the plaintiff's right; that they have made large amounts of money by the sale of the work, and should account to plaintiff for his half of the profits.

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The first defense urged is, that the cause of action stated in the petition is an infringement of copyright, and is not within the jurisdiction of this court, but belongs to the exclusive jurisdiction of the United States courts; but we do not so regard it. The ground of action can not be the violation of the copyright in 1830; for that copyright expired before this book was published by the defendants. And although it might be claimed that the subsequent copyright for the second edition had not expired, and might be regarded as violated by the last editions, yet such is not the actual complaint. The complaint is, that the contract between Gunn and the plaintiff has been violated by Gunn and the defendants, acting in concert, and with full notice of the plaintiff's right in the book and in all its improvements and editions.

We conclude that the plaintiff's suit can not be defeated for want of jurisdiction in this court to try the issues.

The next defenses are the three forms of the statute of limitations. The breach of contract which forms the ground of this action, commenced in 1858, twelve years before this action was brought.

The plaintiff says that it was a breach of trust, which is not barred by the statute. There is no privity of contract between the defendants and the plaintiff, and therefore it can not be said that the defendants have violated a contract with him. Gunn may have done so. A suit against him would be for a violation of his contract, and for aught we can see would be liable to be barred by the limitation of actions on written contracts. But we regard the claim of the plaintiff as the assertion of a constructive trust.

The exception contained in section 6 of the Code, by which it is provided that title II. of the Code shall not apply to continuing and subsisting trusts, may prevent this claim from being barred by the statute. But we think that the Code has not changed the rule in regard to trusts. The fact of the defendants publishing and disposing of this book and denying any right in it, was well known to the plaintiff



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from the very commencement of the publication. Twelve years were allowed to pass by before any suit was brought to enforce the claim of the plaintiff. Lapse of time bars stale claims in equity, in analogy to the statute of limitations.

An interesting case on this point is to be found in 60 Pa. St. 290, Ashurst's appeal, where it was held "that where a party claims to hold another as a trustee of personal property under a constructive trust, he must assert his claim within six years from the time when it is alleged to have originated, in analogy to the statute of limitations." Page 315. By our statute of limitations actions for the recovery of personal property, or actions for detaining personal property, must be brought within *four years* (Code, sec. 15), instead of six years, as in Pennsylvania.

The case made by the plaintiff, we think, is that of a constructive trust of personal property, being an interest in the book and the proceeds of its sale. Now, although the statute of limitations does not in terms apply to this constructive trust, yet it seems to us to be a case which, in its nature, ought to be regarded as analogous to that of the personal property of one detained in the possession of another. By the statute such property could not be recovered after four years; in analogy to which we think the same rule is to be applied to this case. To the same effect are Adams' Eq. 62; Story, 152 a; *Wentworth v. Lloyd*, 32 Beavan, 467, affirmed in 10 H. L. C. 589; *Hovende v. Lord Annesley*, 2 Sch. & Lef. 633; 17 Ves. 97; *Bonny v. Ridgard*, 4 Browne's Ch. Cas. 138. But the case most in point to support the view we have taken is that of *Clegg v. Edmondson*, 8 De Gex., McN. & G. 787. A number of persons were partners in a mine held by lease expiring September 29, 1846. In July, the managing partners, who were trustees for the company, gave notice of dissolution, and in August agreed with the landlord for a new lease. In September, they gave the others notice of their intention to apply for a new lease. In December, a new lease was executed to them in pursuance of the August

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agreement. The others never assented, but claimed an interest, not, however, filing a bill until 1855; that is, nine years after the constructive trust arose. It was held, that having, with full knowledge of their rights, founded on a *constructive, not express trust*, allowed the others to carry on the business so long, they were barred. In commenting on this case of *Clegg v. Edmondson*, Judge Strong, in 60 Pa. St. 320, says, "Here there was an undoubted trust, but the Lords Justices, Bruce and Turner, considered the laches aggravated in view of the hazardous nature of the business asserted to have been carried on in trust for the complainants."

The business of working a mine may not inaptly be compared to the publishing of "Gunn's New Domestic Physician, or Home Book of Health," which at most can not be regarded as more than a new lease of the "Domestic Medicine and the Poor Man's Friend, in the Homes of Affliction, Pain, and Sickness."

The petition must be dismissed.

[Leave to file a petition in error in the Supreme Court refused.—EDS.]

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ANDREW PFIRMAN, Plaintiff in Error, v. DAVID KOCH ET AL., Defendants in Error.

K. and F., partners, dissolved, F. buying out K.'s interest, giving his note therefor. F. insured, and a loss by fire occurred. The firm at the time, without the knowledge of either, was insolvent. Judgment against F. was recovered on the note, and a lien obtained on the insurance money, when the judgment was assigned in payment of K.'s individual debts. The plaintiff, a firm creditor, afterward claimed to subject the same fund. *Held*, That the firm creditors had no lien on the firm property to prevent a valid sale thereof.

That such a valid sale might, *bona fide*, take place as between partners as well as to strangers.

That the purchase and sale as between F. and K. was not a fraud on firm creditors.

That K.'s judgment was entitled to be satisfied from F.'s assets in its order of priority, and that the assignees had a better equity than the plaintiff.

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Pfarrman v. Koch et al.

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This was a proceeding in error on the part of the plaintiff below, to reverse a decree of the court in Special Term, rendered in favor of some of the defendants.

The whole case is fully stated in the opinion.

*Forrest & Lindemann*, for plaintiff in error.

*Shonter & Smith*, contra.

HAGANS, J. Koch & Freiderich were in partnership in the liquor business. Neither of the parties were aware of the fact that the partnership was actually insolvent, when Koch sold out his interest in the firm to his copartner, Freiderich, for \$1,000, who gave his note therefor. Freiderich took all the property, and assumed all the firm liabilities, and also insured the property, after his purchase, in his own name. The note was not paid when due, and Koch brought suit on it against Freiderich, and obtained judgment. In the meantime Freiderich, who was still carrying on the business, was burned out, and the loss was adjusted with the insurance companies. Koch instituted proceedings, in aid of execution, on his judgment against Freiderich, in the Probate Court, served process on Freiderich and the insurance companies, and sought to subject the funds in their hands to the payment of his judgment. While the proceeding in the Probate Court was pending, Koch, in good faith, assigned part of the judgment to Anthony Shonter, part to Hauck & Windisch, and the residue to Philomena Arndt, in satisfaction of his individual indebtedness to them, of which assignments the insurance companies were notified. Some of the creditors of the firm of Koch & Freiderich afterward brought suit in the Court of Common Pleas on judgments obtained by them against Koch & Freiderich, in which they sought to subject the same funds in the hands of the insurance companies to the payment of the judgments, and enjoined further proceedings by Koch in the Probate Court. The plaintiff in this action, who held a judgment against Koch & Freider-

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ich, was not a party to any of these proceedings, and six months afterward brought this suit in this court, making all the parties in the cause pending in the Court of Common Pleas parties here, and alleged that the sale of Koch's interest in the firm to Freiderich was a fraud; that the indebtedness of \$1,000, the consideration of said sale, was fraudulent and void, as against the creditors of the firm, because the interest sold was, in fact, worthless, the firm being insolvent at the time, of which the plaintiff was then personally cognizant, and asks that the liens on the funds in the hands of the insurance companies be marshaled, and that his judgment be paid therefrom.

In the meantime, after this suit was brought, the cause pending in the Court of Common Pleas was tried, and that court adjudged the funds to belong to the partnership creditors, in the order of priority, but also gave effect to the said judgment, obtained by Koch against Freiderich, and decreed that the assignees thereof be paid out of the funds, in their order of priority. That decree was not carried into effect, so far as the assignees of the Koch judgment are concerned, by common consent. These assignees have filed their answers here, not only setting up the decree in that case in bar to this suit, but denying plaintiff's right to recover at all as against them.

The plaintiff now claims that the goods burned were substantially firm property, though the testimony shows no satisfactory identity of the property sold by Koch to Freiderich with those insured by Freiderich, and burned; and also seeks to recover out of the funds enough to satisfy his judgment against the firm. Koch was insolvent when this suit was brought, and is still insolvent; and Freiderich has since died, and his estate is also insolvent.

We have not considered the effect of the decree rendered in the Court of Common Pleas during the pendency of this suit, preferring rather to consider this case upon its merits.

It is a familiar principle of the law that fraud vitiates

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all contracts. If this sale of Koch to Freiderich were fraudulent, as against the firm creditors, such funds as those that appear here might be reached by the application of equitable principles in a proper case. No actual fraud was committed by either of the parties at the time of the sale, which seems to have been *bona fide*. Indeed, so far as the testimony shows, it is questionable whether the firm was really insolvent at the time of the sale, though, for the purposes of the case, it may be said to have been so in the popular sense of the term. It does not necessarily follow that the interest in the stock of goods was the only consideration of the note. Both the partners agreed at the time that Freiderich should buy out Koch at the price of \$1,000. Freiderich made no resistance to the recovery of the judgment on his note for the purchase money, nor did he in his lifetime, nor has his administrator since his death made any objection, either to the payment of the judgment or the assignment by Koch of the same to the payment of his individual creditors.

Was there any reason, under the circumstances, why one partner might not sell out to the other in good faith? We think not. It was entirely competent, upon the dissolution of the firm, that the members of it should agree, for a valuable consideration, that the partnership property should belong to one of them; and thereby the whole property will be vested in such partner, wholly free from the claims of the firm creditors. These creditors had no lien on the partnership property for their debts, but only an equity, to be worked out through the partners, to insist upon its application thereto. Story on Partnership, sec. 858 *et seq.*; *Wilcox et al. v. Kellogg et al.*, 11 Ohio, 894; *Belknap v. Cram et al.*, 11 Ohio, 411.

Clearly, therefore, the property vested in Koch absolutely, who insured it in his own name. No lien on the property, on the part of any firm creditor, admitting that they were the goods of the former partnership that were destroyed, and that the insurance money was really

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the firm's, was had until after Koch had seized the funds in the hands of the insurance companies (*Bank of Rochester v. Bank of Sandusky*, 6 Ohio St. 254), and had actually transferred the judgment to the defendant in satisfaction of his individual debts, to which Freiderich may be held to have assented, as he did not then or at any subsequent time resist. And this transfer would be good, both in law and equity, though the assignees of the judgment knew the parties were insolvent. *Sigler v. The Knox Co. Bank*, 8 Ohio St. 511; *Gwin, Reed & Taylor v. Selby et al.*, 5 Ohio St. 97.

It is argued that the plaintiff has a prior or better equity than the defendants. We have seen that the sale vested the title to the property in Freiderich; that the funds in the hands of the insurance companies were his, and not those of the firm, and that the firm creditors had no lien upon it. How, then, can the plaintiff claim any prior or better equity? If he seeks to subject these funds as the funds of Freiderich, Koch had seized them by his proceedings in aid of execution, and the plaintiff made no effort to do so until six months afterward. If he seeks to subject these funds as the funds of Koch, Koch had assigned to the defendants long prior to the service of process in this case. The equity of the assignees of the judgment, in any view we can take of this cause, is prior and better than that of the plaintiff.

The judgment will be affirmed.

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ANN SYKES v. S. P. BONNER.

The plaintiff sued the defendant, a physician and surgeon, for "carelessly, negligently, and improperly treating her arm," estimating her damages at \$3,000. After one trial, in which the plaintiff gained a verdict, and after this verdict had been set aside and a new trial granted, the defendant

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brought suit against the plaintiff, before a magistrate, to recover compensation for his services, and obtained judgment by default:

*Held*, that such judgment is not a bar to the suit for damages in this court.

This is an action against the defendant, as a physician and surgeon, who undertook to cure the plaintiff of a painful swelling of the left arm, for reward, and it is alleged he so carelessly, negligently, and improperly treated the plaintiff, by cutting one or more arteries and veins, that her life was in great danger, and her arm has been rendered wholly useless, by reason of which, etc., she has been damaged \$3,000.

A trial was had to a jury, and a verdict was rendered for the plaintiff, on the 10th December, 1869, for \$1,000, which verdict was afterward set aside, and a new trial granted, January 21, 1870. On the 24th December, 1870, the defendant filed an amended and supplemental answer, which, besides a general denial of the allegation of the petition, contains a statement that since filing his former answer, defendant, viz: in November, 1870, "in order to establish the fact that he had treated the plaintiff's arm with all proper care and skill, and that he was not guilty of any negligence in regard to it, and that he was entitled to compensation for his services," brought suit therefor against the plaintiff, before John W. Carter, a justice of the peace, to recover \$100, and that, after hearing the evidence, the justice rendered judgment in favor of the defendant, against the plaintiff, for that amount and costs. The defendant attaches a certified transcript of the judgment, making it part of his answer, and avers that said judgment is unreversed, unsatisfied, and in full force, and that the justice had jurisdiction to hear and determine the same, and pleads said judgment as a bar to all claim of damages.

To this answer the plaintiff replies a reiteration of the allegations of negligence set out in the petition; she admits she was served with process in the suit before the magistrate, and admits the transcript to be a correct one, but

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says she did not know what that suit was for until the filing of the answer; that she did not appear in said case, nor was any testimony offered or received in her behalf, nor was any counter claim filed, set-off or defense claimed or considered by the justice; and that the amount of damages sustained by her exceeded the jurisdiction of the justice.

To this reply the defendant filed a general demurrer, which was reserved to General Term.

*John W. Okey and R. S. Swing*, for plaintiff.

*Jordan, Jordan & Williams and T. J. Phelps*, for defendant.

HAGANS, J. In looking into the justice's record, it appears that the judgment against the plaintiff for the professional services of the defendant was taken by default, and on the testimony of the defendant himself only. It was certainly not necessary, in order to entitle the plaintiff in that case to recover, that he should prove that he was not guilty of any negligence in his professional treatment. It was enough to show, simply, that he performed the service at the defendant's request and their value, and the fact that the amount was due. There were no pleadings and no issues. There is nothing in the record to show that the question of negligence was involved. Now, it is argued, on the authority of *Gates v. Preston*, 41 N. Y. 113 (which is a case exactly like the present, except that there the defendant, before the magistrate, consented in writing to a judgment); *Bellinger v. Carigue*, 31 Barb. 584; *Davis v. Talcott*, 2 Kern. 184, and *White v. Merritt*, 3 Seld. 352, that the judgment recovered for the services before the magistrate is a direct admission on the record by the plaintiff in this case of all the facts, which the plaintiff, before the magistrate, would have been bound to prove on a denial of the cause of action alleged there; and that the recovery by the plaintiff there was dependent on a full



performance of his duties in the treatment of his patient, and that the plaintiff here is estopped from questioning that fact in any controversy on the same agreement for services.

We do not see how the plaintiff, in the case before the magistrate, was bound to prove that he was guilty of no negligence in his treatment of the arm before he could recover for his services therein. It was enough to prove the services and their value. We are inclined to think with Judge Daniels, who dissented in *Gates v. Preston*, that the question of malpractice was not necessarily in issue before the justice. It will be observed in the cases cited by the defendant, that in the first three there are dissenting opinions, and the rule laid down in the *Duchess of Kingston's* case (20 Howell's St. Tr. 538), which has been adopted by our Supreme Court in *Lore v. Truman*, 10 Ohio St. 45, and stated by Daniels, J., furnishes a sufficient answer to the argument. The merits of this case, under the circumstances, could not necessarily be involved without an issue on the question of negligence; and, so far as the record and the pleadings show, the evidence adduced before the justice was for a different purpose. The effect of that judgment can not be extended or enlarged by argument or implication to matters, so far as the record shows, which were not actually heard and determined. *Johnson v. Ormsby*, 8 Casey, 198; *Mallett v. Foxcraft*, 1 Story, 474; *Spooner v. Davis*, 7 Peck, 147. The magistrate, doubtless, presumed, as is usual in such cases, that there was no negligence, and so rendered judgment. There was an appearance in the cases cited by the defendants, so that it might with some slight reason be claimed that the judgments were conclusive. But in the case at bar the judgment before the justice was by default, and it can not be urged for as strong a reason that it is conclusive on the question of negligence. The amount of damages far exceeded the jurisdiction of the justice, and, according to the justice's code, sec. 108, 1 S. & C. 788, if the defendant there had

pleaded these damages, she might have withheld all of them except enough to cover the plaintiff's claim, and still the plaintiff be entitled to recover in this action if the judgment there had been in her favor. But was she bound to appear before the justice at all? If she was not, we do not see how that judgment can be conclusive of the issues in this case. According to section 95 of the Code, 2 S. & C. 979, "If the defendant omit to set up the counter-claim or set-off, he can not recover costs against the plaintiff in any subsequent action therein;" and this provision applies to suits before justices. Sec. 202, 1 S. & C. 804. The only penalty for not appearing there is that she may not be entitled to recover costs in this action. Her omission to plead there is no bar to a recovery here, except it may be a bar to the recovery of costs. She might have appeared there, and pleaded her counter claim for these damages, and then elected to withdraw it, and allow a judgment to be rendered against her by default for these services, without that judgment being a bar to this action. Sec. 119, 2 S. & C. 984; *Bodurtha v. Phelon*, 13 Gray, 413. And this is so, where, at the time of the hearing and rendition of the judgment before the justice, her election was already made, and this action was pending, in which there was an appearance, and a trial and a verdict had occurred.

We are not impressed, when we look into our Code, with the application of the reasoning in the New York cases, and must overrule the demurrer.

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THE CINCINNATI GERMAN BUILDING ASSOCIATION No. 3 v.  
CHARLES FLACH ET AL.

A. was the owner of ten shares in a building association, incorporated under the laws of the State (S. & S. 194), on June 4, 1868, and during the first year drew out of the treasury, in accordance with the constitution and by-laws of the association, \$4,000. To secure this amount, together with the dues,

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Cincinnati German Building Association No. 3 v. Flach et al.

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interest, and fines, B. gave a mortgage on real estate to the association for the sum of \$4,480, the premium of \$480 not being usurious by the laws of the State. A. stopped paying dues and interest, July 27, 1869. The building association commenced suit in October, 1869, to foreclose the mortgage and on March 3, 1870, obtained an order for sale.

*Held*, that the present value of the mortgage in the decree of distribution dated, November, 1871, is obtained as follows: Ascertain by proof the probable duration of corporation, and calculate the dues and interest yet to come; then find the principal which, with interest for the supposed time, will amount to the dues and interest already calculated; this will be the present value of the anticipated payments; to this principal add the arrearages due, and the fines for the time between the date of default and the date of the entry of decree for sale, and the sum will be the present value of the mortgage.

*Tafel & Throop*, for plaintiff.

*J. R. Von Seggern*, for defendants.

HAGANS, J. This is an action to foreclose a mortgage, and the questions presented arise upon the distribution of the proceeds of sale.

One Frederick Reichert was a member of the association, which was incorporated according to the act passed for that purpose (S. & S. 194), and owned ten shares of stock therein of \$448 each, amounting to \$4,480, with the obligation to pay weekly dues and fines. He chose, by a drawing according to the constitution and by-laws of the corporation, to loan from it, during the first year of its existence, or rather to anticipate the payment of his shares, and according to its rules he received \$4,000, which was then the present equivalent value of all his stock. This was on the 18th November, 1868. He now, in addition to dues and fines, agreed to pay interest on that amount monthly, at the rate of six per cent., and to secure by mortgage the payment of the par value of his stock when the corporation should be dissolved, dues, interest, and fines. There was no intention to repay the money advanced, for it was supposed that in process of time the weekly dues paid by him and the profits of the company to be distributed to him would pay

the amount, and the mortgage be canceled; but there was the obligation now to pay \$1.05 weekly dues on each share, a monthly installment of interest at six per cent. on \$4,000 and a fine of 20 cents a week, if he failed to pay the weekly dues.

Accordingly the defendant, Charles Flach, executed a mortgage on certain real estate, to secure all these things, the condition of defeasance in which reads as follows: "Provided, nevertheless, that whereas the Cincinnati German Building Association No. 3 have this day loaned to Frederick Reichert the sum of \$4,480, representing ten shares of stock in said association; now, therefore, if the said Frederick Reichert shall well and truly pay to said association the said sum of money loaned as aforesaid, at the time and in the manner prescribed by the constitution and by-laws of said association, then these presents shall be void." Reichert made default, and there are mortgagees of Flach, subsequent to the plaintiff, who contest the amount claimed to be due from Reichert, and also that it is within the lien of the mortgage. Contributions continue on the part of all the members at the same rates, whether they loan the money by way of anticipating payment or not, until the society is able to pay the stock of those who have not anticipated, and those who have anticipated pay up according to their obligations when the society dissolves. There are a very large number of these corporations in this county, whose capital aggregates more than thirty millions of dollars, and many more millions of capital are so employed in other parts of the State, thus seeming to demonstrate their practical value and usefulness as methods of saving by small amounts in aid of the stockholders. In many of the States of the Union and in England they have been in operation for many years, but were only authorized by law in Ohio in 1867. In *Bibb Co. Loan Association v. Richards*, 21 Ga. 592, and *Martin v. The Nashville Building Association*, 2 Cold. 418, will be found a historical sketch of their origin. There are usually two plans for disposing of the money received by these corporations, the

"drawing" plan and the "auction" plan, the former of which the plaintiff herein adopted.

Though the provisions of the constitution and by-laws of this corporation are somewhat novel, we do not see but that they are strictly within the provisions of the act.

It was conceded in argument that the premium of \$48 per share paid by Reichert, as well as the interest, penalties, and dues, did not constitute a device for obtaining usurious interest. The legislature seems to have provided for any question of this sort in the first section of the act (S. & S. 194), and as we think this association was acting within its corporate powers, and had in view the purposes contemplated by the act, we must hold that in exacting these demands there is no usury. *Silver v. Barnes*, 6 Bing. N. C. 180; *Shannon v. Dunn*, 43 N. H. 194; *Schober v. Ac. S. F. & L. Association*, 35 Pa. 223; *Martin v. Nashville Building Association*, 2 Cold. 418.

The amount for which Reichert is liable for Flach is subject to some difficulty. And we have no guide in this State by which we can determine it, for the association is to be dissolved now, so far as Flach is concerned, and yet it had six years to run when organized, if its operations are successfully conducted, as the premium of \$48 to be paid by those who anticipated payments the first year, is reduced by eight dollars per year afterward to those who chose to draw out in the subsequent years. Certainly the amounts should be calculated up to the time of the entry of the decree of distribution. Default in payments of dues, etc., was made July 27, 1869, and the decree of sale was entered March 3, 1870. Now, the plaintiff claims the calculation should be made as follows:

121 weeks of dues at \$10.50,	-	-	-	-	\$1,270 50
2 years 4 months interest, not paid,	-	-	-	-	560 00
32 weeks of fines at \$2,	-	-	-	-	64 00
Principal sum,	-	-	-	-	\$4,480 00
Cash paid,	-	-	-	-	\$610 00
Am't weekly dues not paid,	1,270 50	-	\$1,880 50	-	2,599 50
Total amount due,	-	-	-	-	\$1,494 00

This calculation is made as if the decree of distribution were made at the November term, 1871. Why the amount of unpaid dues should be deducted as above does not clearly appear. If they are within the mortgage their payment is secured, as well as the fines and interest, and they, too, might as well be deducted.

The plaintiff bases his calculation on the following rules:

1. Calculate the amount of weekly dues from the time of stopping payment to the date of decree of distribution.

2. Add to this, monthly interest for same time on amount loaned.

3. Add also fines from time of stopping payment of dues to date of order for sale, as that concludes the liability as to them.

4. From the face of the shares, take the weekly dues paid *voluntarily*, and those calculated in the decree of distribution as unpaid; and to this balance,

5. Add items 1, 2, and 3, and this will give the amount due.

These rules are, of course, based on the idea that the face of the mortgage is the true minuend, though it may be long before the society may be dissolved and its members paid off. No time is fixed in the mortgage for the payment of the money. They would be just as applicable if the foreclosure was had within six months after the loan was made, as six years, and they have no reference to the probable duration of the association, which depends on contingencies that can not be foreseen. On the other hand, Flach makes two claims: *First*, that the calculations of interest should be made on the amount actually loaned at six per cent., deducting payments made. And, *secondly*, that at all events, from a reference to the by-laws and constitution named in the mortgage, there is a contingency, on the happening of which payments are to cease; and, therefore, as no time is fixed for the payment of the money, the present value of the stock at the time of the decree of distribution, based upon the probable duration of the society, should be ascertained on testimony,

and then estimate the aggregate amount of the monthly installments payable during that time, and from that sum rebate a just amount for interest, and add thereto the arrearages due, after allowing for payments made. And to illustrate his idea, he submits the following statement, on the hypothesis that the probable future duration of the association is three years:

Weekly dues for 8 years to come, 156 weeks,	
at \$10, - - - - -	\$1,560 00
Interest for same time on \$4,000, at \$20 a	
month, - - - - -	720 00
	<hr/>
	\$2,280 60
Rebate interest on this sum for one half the	
time, - - - - -	205 20
	<hr/>
	\$2,074 80
Add weekly arrearages due 121 weeks, \$10, -	1,210 00
Arrearages of interest, 2 and 4-12 years on	
\$4,000, at \$20 per month, - - -	560 00
	<hr/>
	\$3,844 80
Credit by 61 payments of dues at \$10, -	\$610 00
By paid 7 months' interest at \$20, -	140 00
	<hr/>
	750 00
	<hr/>
	\$3,094 80
Add 32 weeks fines at \$2, - - - - -	64 00
	<hr/>
Present value of mortgage, - - - - -	\$3,158 80

This is calculated, say to November 7, 1871.

In support of this theory of computation, *Robertson v. The American Home Association*, 10 Md. 397, was cited. That was the case of a similar corporation, the shares of stock being \$200. And Robertson being the owner of four shares "redeemed" or anticipated their payment by receiving, at the rate of \$115 for each share, or \$460, and in consideration of that sum executed a mortgage, which secured the monthly interest thereon, the weekly dues, until each unredeemed

share should be worth in cash \$200, and fines, and also ground rents, etc., the property mortgaged in that case being a leasehold estate. It will be observed that there was no provision for the repayment of the principal sum in that case as in this, and like this case, no time was fixed for the payment. And the court held that the amount due must be ascertained on proof, and inasmuch as the payment of no principal sum was secured, but only the weekly dues, monthly interest, and fines, after allowing credits for money paid, these last must be the amount of the decree, which should stand as security for future liabilities. But the court also held, that if the property was sold, then the amount of the present value, in gross of the sum secured by the mortgage payable in future must be ascertained by proof. In other words, to ascertain the present value of the shares, as though the whole stock was to be paid off to the holders at this time. The right to redeem, by paying the principal sum and interest, less payments made, was refused in *Seagrave v. Pope*, 15 E. L. & E. 477, on the ground that the advance made was not a loan, but an anticipatory payment by way of discount, of the shares which the holder would otherwise be entitled to at the termination of the society, and that disposes of the first claim made by Flach. And that was a case in which there was no condition in the mortgage for the repayment of the money advanced. Now here, not the sum advanced, but the ultimate value of the shares, is secured to be repaid by the mortgagor, "at the time and in the manner prescribed by the constitution and by-laws of said association." Although no time is fixed for repayment, and no contingency stated when it shall be due, still, on reference to articles 10 and 17 of the constitution and by-laws, which this corporation had the right to make under the law, and which are sufficiently incorporated in the mortgage to make them part of it, we find that the whole operations of the society are to be determined, and the moneys distributed among the stockholders and all mortgages released, whenever each stockholder has received \$448 per



share. When this will happen, depends on the success of the operations of the corporation. Unforeseen contingencies may happen to delay it many years. No tables have been prepared by which the present value of such interest can be ascertained like annuity tables. And, indeed, proof of this subject would be an unsatisfactory method of determining it. But no other way would seem to be left open, and we are disposed to adopt it.

While there is not power of present redemption in the mortgage, by the payment of the principal sum advanced and interest, and no offer to comply with the constitution and by-laws as to which default has been made, we see no reason why the property may not be sold in entirety to satisfy the mortgage according to this rule. No one makes objection to it.

It is apparent, from the premium charged, the debt, and the premium to be charged those who drew out subsequently, decreased by eight dollars for each year, that when the society was organized, it was supposed it would be able to wind up and dissolve in six years. All the profits of its operations have reference solely to the time of dissolution, and as those profits are greater or less, its dissolution will be hastened or retarded.

The principal sum secured by the mortgage is to be repaid at no fixed time, but according to the constitution and by-laws, that is, it is not to be repaid at all, for whenever the society has realized by its operations from all sources, \$448 a share, it is ready to dissolve. We see no reason, therefore, why we should necessarily take the sum named in the mortgage as the basis of a calculation, when we are to ascertain the present value of the mortgage, with reference to the probable duration of the society. The sum advanced was at the time the present value of the stock, based upon its supposed duration. The law, which does not treat these transactions as usurious, allows a premium of forty-eight dollars a share to be taken from the defendant by the corporation. These premiums have reference to its sup-

posed existence in the future, and the stockholders pay it accordingly. We are now to anticipate the dissolution of the society so far as Flach is concerned. It is just to leave the premiums in the hands of the society, and we are to calculate the dues for the time to come according to the obligations of Flach. But inasmuch as these payments are anticipated, the society should pay interest for the use of the same until the society dissolves. We can see no reason for deducting the payments already made by Flach from such a calculation, as in 10 Md. 397. Why that was done in that case is not apparent, but, on the contrary, seems to be unjust to the society: nor yet why interest on the anticipated payments was rebated for only half the future duration of the society, as that seems to be unjust to the defendants. That case does not appear to have been well considered, and the rule adopted appears in many respects to be wholly arbitrary and inapplicable to the case at bar.

We think such a rule must be ascertained as will be just to the society and to the remaining stockholders, while it is consistent with the obligations of the individual member and the condition of his mortgage, and gives to him the benefit of all profits made. As we have seen, the dissolution of the society occurs whenever from the profits of its operations it can pay each member \$448 for each share of stock. Of course, if the operations are very profitable, it will dissolve sooner than if otherwise; and in any event, upon the dissolution of the society, the party gets the premiums back out of the profits of its operations. When it will dissolve can only be ascertained upon testimony, therefore, and in any event must be more or less unsatisfactory, but no other way seems to be left open to us. Having ascertained the probable duration of the corporation, then calculate the dues and interest yet to come. Then, such a sum as put to interest for the supposed time as will realize the amount of dues and interest calculated, is the present value of the anticipated payments. To this amount, add the arrearages due, and the sum will be the present value of the mortgage.

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Heller v. Meiss et al.

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To illustrate the rule stated, suppose this society will probably endure for three years to come, and that the decree of distribution will be entered as of the November term, 1871, the account will stand thus:

Weekly dues for 3 years to come, 156 weeks,	\$1,638 00
Interest for same time on \$4,000, - - -	720 00

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\$2,358 00

Now, \$1,998 30 if put at interest for 3 years will be, \$2,358 00

Then the present value of the anticipated payments is - - - - - \$1,998 30

Arrearages of weekly dues, 121 weeks, at \$10.50, 1,270 50

Arrearages interest, 2 4-12 years, - - - 560 00

Fines for 32 weeks to entry of decree for sale, 64 00

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The present value of mortgage, - - - \$3,892 80

For the purpose of ascertaining by testimony the probable duration of the society, as the basis of a calculation according to the rule we have stated, the cause will be remanded to Special Term, and distribution may be had accordingly.

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WILLIAM HELLER, Plaintiff in Error, v. LAZARUS MEISS ET AL., Defendants in Error

Before administration, the widow and only son of an intestate conveyed by deed the deceased's realty to H., who gave a note, secured by mortgage on the premises, for the unpaid purchase-money. Subsequently the son took out letters of administration, was sued as administrator, and a judgment recovered against him, which, after an order for a sale of the same realty, made by the probate court, H. offered to pay.

On suit brought by M., a holder before maturity, for value, of H.'s note and mortgage, to foreclose:

Held, that H. was entitled to recoup the amount of the judgment from the amount due on the mortgage to M.

This was a proceeding to reverse a decree made at Special Term against the defendant below.

The facts of the case are fully set forth in the opinion.

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Heller v. Meiss et al.

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*Pruden*, for plaintiff in error.

*Conklin*, contra.

HAGANS, J. Frank P. Weiler died intestate and seized in fee simple of a house and lot, on Fillmore street in this city, leaving Anna J. Weiler, his widow, and John J. Weiler, his only heir-at-law. No administration was had on the estate of Frank P. Weiler, and on the 17th July, 1868, his widow and heir sold and conveyed the house and lot to William Heller for \$5,300: \$1,800 in cash, and \$3,500 in two equal payments, due in one and two years after that date. Heller executed his negotiable promissory notes accordingly, payable to John J. Weiler, and also a mortgage on the same property to secure them, the first one of which was paid at maturity.

John J. Weiler indorsed the second note, for a valuable consideration, to one John Kruger, who afterward, for a valuable consideration, indorsed it to the plaintiff, all before the maturity of the note, and the mortgage was duly transferred to the plaintiff.

Shortly after the sale and conveyance to Heller, John J. Weiler took out letters of administration upon the estate of his father in the probate court of this county, and applied the cash proceeds of the sale to the payment of the debts of the estate. A judgment was obtained against him as administrator (the intestate being liable as indorser on a note) for \$586.30 and costs, which judgment is not paid. Weiler was removed as administrator and E. H. Kleinschmidt was appointed administrator *de bonis non*, and he filed a petition in the probate court to sell the property in question to pay the judgment for \$586.30, costs, and interest. The probate court rendered decree and order for sale, which, upon appeal, was affirmed.

Shortly before Kleinschmidt, as administrator, filed his petition, the plaintiff brought this suit to foreclose the mortgage and sell the property, to which the administrator was

afterward made a party. Heller answered, setting up the facts as stated; alleged his willingness to pay the note, but asked that the amount of the judgment be credited on or deducted from it.

On this state of fact, the judge, at Special Term, found that Heller was entitled to no deduction by reason of said judgment, and rendered a decree and order for sale of the premises for the whole amount due on the mortgage accordingly.

Heller's title appears to us to be good, notwithstanding the want of administration upon the intestate's estate, subject however to any unpaid debts of the decedent, for he takes no better title than the widow and heir had. Certainly neither the widow nor the heir can object to his title; and it seems to us equally clear, that if the mortgagee, Weiler, had brought this suit, there is no reason why Heller should not be entitled to a recoupment of this judgment. The estate, of which the widow and heir are distributees, is liable for damages to the amount of the judgment for a breach of the covenants in the deed, and they can not be permitted, in equity, to recover the purchase-money without payment of this judgment.

But does the fact that the note has been indorsed for value, before its maturity, to an innocent holder, make any difference in this action? We think not. This is a proceeding to sell the land for a mortgage debt, and the assignee of the mortgage stands in no better position than the mortgagee. A mortgage is not a negotiable instrument, and the holder is bound by the assertion of the prior equitable rights of third persons. 1 S. & C. 862. So that this cause stands upon the principles stated by our Supreme Court in *Bailey v. Smith*, 14 Ohio St. 396.

The decree, therefore, in this cause, must be modified by an allowance to Heller, as against the plaintiff, of the amount of the judgment against the estate in the distribution of the proceeds of sale, and the cause will be remanded for further proceedings.

## A. H. CHILDS ET AL. v. THE LITTLE MIAMI RAILROAD CO.

In an action against a common carrier for goods lost during transit, where, instead of merely declaring on the contract, the plaintiff has alleged negligence on the defendant's part, which was traversed by the defendant, the burden of proof of such negligence is on the plaintiff, and mere presumption of negligence, because there was a loss, is not enough to authorize a recovery, where there is rebutting proof.

The goods were lost while on a side-track, and this was claimed to be sufficient proof of negligence; but this is too remote. The maxim *causa proxima non remota spectatur* applies to this as to other contracts.

Action to recover the value of twenty-one bales of cotton, laid at \$4,250, shipped in January, 1866, at Cincinnati, by the plaintiffs, on the defendant's line, for Allegheny City, Pennsylvania. The cotton was put on an express train at Cincinnati, which, when it reached Xenia, Ohio, at about 8 o'clock P. M., was shifted onto a side-track. While there, in some way, the cotton took fire, and was consumed. The bill of lading contained several exemptions from losses, and the petition alleged that this loss was not among them, but was caused by the negligence and improper conduct of the defendant.

The defendant denied that the loss was not among these exemptions of the bill of lading, and also all negligence or improper conduct.

On the trial it appeared that the cotton was left in the cars, on the side-track, at Xenia, some four or five hundred yards from the depot, for the purpose of allowing a train of live stock, which had the preference, to go forward, and that no cause could be, with certainty, assigned for the fire. It was in evidence that the defendant had a watchman, who was engaged, together with other duties, in taking care of the fires at the depot. About midnight, as he was standing at a switch, the engineer of a train he was letting pass by, informed him that the cotton was on fire. He had examined the cotton cars about half an hour before, and found no appearance of fire. He, with others,

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*Childs et al. v. Little Miami Railroad Co.*

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attempted, without success, with axes and buckets of water, to put out the fire, and the alarm was given to the fire companies of Xenia. It was shown by the evidence that the railroad employes and the fire department were not on good terms; that all the engines but one turned back without coming to the fire, and that one, at first, was without hose. In addition to this, it was a very cold night, and great difficulty was experienced in obtaining water, and the result was the loss of the greater part of the cotton, some by being burned in the cars, and a large portion destroyed by another train passing the spot, after it had been saved from the burning freight cars. It was in evidence that it was a matter of convenience to the railroad company to take the cotton to Xenia, where trains were made up, in addition to the regular trains, which were alleged to be insufficient to do the whole business of the road, rather than to allow it to remain in the depot at Cincinnati.

These facts were the substance of the finding of the judge at Special Term, before whom it was tried on submission, and thereon he rendered judgment against the railroad company for the value of the cotton rolled out of the cars and afterward destroyed by the negligence of the defendant, computing it at one-third the whole value, and judgment in favor of the defendant for the remainder. To this judgment the plaintiffs took exception, and the case came up on error to the General Term.

*Hoadly & Johnson*, for plaintiffs.

*Matthews & Ramsey*, contra.

HAGANS, J. We have no disposition to disturb the conclusions of fact arrived at by the judge at Special Term.

In looking into the bill of lading we find several special contracts as to exemption from liability from loss, all of which it is admitted are within the cases found in our Supreme Court Reports. *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, 4 Ohio St. 362.

It is not, we think, seriously contended that there remains anything in the case but the question of negligence. The plaintiffs allege negligence in the petition. They might have been content to aver the receipt and non-delivery of the goods according to the contract, thus leaving to the defendant the burden of pleading and proving due care and no loss within the contract as an excuse for the non-performance of its requirements. If the pleadings presented themselves thus, there could be no question about the burden of proof. As they stand, however, it is claimed that, from the frame of the pleadings of the plaintiffs, they have assumed the burden of proof, and that they must make out their case by the preponderance of testimony.

The plaintiffs could not have recovered except on the contract, which contains these stipulations of exemption from liability. Suppose the plaintiffs had declared on the non-delivery of the goods, and the defendants had answered that the loss was within one of the exceptions of the bill of lading. Then the plaintiffs, unless they contested the averment of the answer, would have replied substantially in the allegations of the petition. And this, it seems to us, would have thrown the burden of proof upon them. In *Railroad Co. v. Reeves*, 10 Wall. 176, where the common carrier showed the loss was from the *vis major*, it was held that he was excused without proving affirmatively that he was guilty of no negligence, and the proof of negligence, if asserted to exist, rests on the other party. "What is to make him liable?" asks the court, in that case, after proof of loss by *vis major*. "No question of his negligence arises, unless it is made by the other party. If, after he has excused himself, by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it." If the plaintiffs had gone to trial on the averments of the supposed answer, then the burden of proof would clearly have been on the defendant. That was so held in *Davidson v. Graham*.



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Hesterberg v. Equitable Life Insurance Co.

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Now, we think the burden of proof was on the plaintiff, and, in looking into the testimony, we are not prepared to say the judge below erred in his finding. It was not enough to presume that the cotton took fire from some negligence, such as a spark from a passing locomotive falling on it through an opening in the car, which is the theory of the plaintiffs, without some satisfactory proof on the subject. *Non constat* but that it may have been by spontaneous combustion, which no human care could guard against, and which the tightest cars could not prevent. There was no proof on the subject whatever. It was claimed that there was a "deviation," so to speak, in delaying the cars on the side-tracks; but this is too remote. *Causa proxima non remota spectatur* is a maxim which applies to this as to other contracts. *Morrison v. Davis*, 20 Pa. St. 171; *Dewey v. New York Central Railroad*, 13 Gray, 481.

The mere presumption of negligence where a loss has occurred, which is rebutted by testimony, such as we find in this case, is not strong enough to authorize a recovery. Nor do we think there is sufficient evidence to warrant the statement that the defendant ought to have refused taking the cotton on the ground of insufficiency of transportation; nor that the defendant is liable because the loss occurred while the cotton was not in transit, according to an exception of such a loss in the bill of lading.

The judgment will be affirmed.

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THERESA HESTERBERG v. THE EQUITABLE LIFE INSURANCE CO.

A policy of life insurance contained in the premium clause the words "in consideration of the quarterly premium of \$30.24, to be paid on or before the 28th day of November, February, May, and August," and in the payment clause, "the balance of the year's premium, if any, being first deducted."

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Hesterberg v. Equitable Life Insurance Co.

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*Held*, that the contract was for a yearly premium in quarterly installments, and the death occurring subsequent to the August payment, a deduction of the subsequent November, February, and May installments should be allowed.

RESERVED TO GENERAL TERM.

*Stallo & Kittredge*, for plaintiff.

*Sage & Hinkle*, contra.

HAGANS, J. This is an action on a policy of life insurance for \$2,000, dated August 31, 1866; and the only dispute is as to the amount of the recovery. The question arises on the following clauses of the policy: "In consideration . . . of the sum of Thirty  $\frac{24}{100}$  Dollars, to them paid by . . . Theresa Hesterberg, wife of Henry Hesterberg, and of the quarterly premium of Thirty  $\frac{24}{100}$  Dollars, to be paid on or before the 28th days of November, February, May, and August in every year during the continuance of this policy, do assure the life of the said Henry Hesterberg . . . in the amount of Two Thousand Dollars, etc. And the said society do agree to pay the amount of said assurance . . . in sixty days after due notice and proof of the death, during the continuance of this policy, of the said person whose life is hereby assured as above, the balance of the year's premium, if any, being first deducted therefrom."

The quarterly premium, due August 28, 1869, was paid, and on the 10th November, 1869, Hesterberg died.

The court found that the defendant was not entitled to deduct the premiums due November 28, 1869, February 28, 1870, and May 28, 1870, and rendered judgment for the balance. Motion for a new trial was made, and reserved for hearing to this court.

The plaintiff claims that the quarterly premium of August 28, 1869, being paid in advance, nothing was due the company, and she was entitled to recover the full amount of the policy. The defendant claims that the year's pre-

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Miller v. Simms et al.

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mium unpaid, amounting to \$90.72, must, under the terms of the policy, be deducted; and this is the question to be determined.

It is very evident that the quarter's premium due November 28, 1869, was not payable until after the assured deceased. We think, however, that the very evident purpose of the contract was to assure the deceased for a yearly premium to be paid in quarterly installments. *Debitum in presenti, solvendum in futuro*. As we think this to be so, all difficulty in construing the contract disappears.

The motion for new trial will be granted; and judgment may be taken here, according to our opinion.

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S. F. MILLER, Plaintiff in Error, v. B. F. SIMMS, SYNDIC, ET AL., Defendants in Error.

The granting of a motion for a new trial, made at the term of the trial, within the time prescribed by the rules, is within the discretion of the court, and ordinarily will not be reversed on petition in error.

An order dismissing the case without prejudice, after the new trial granted, will not be reviewed on a petition in error unless there is a bill of exceptions showing the evidence before the court upon which it acted.

*Dickson & Murdock*, for plaintiff in error.

*Scarborough & Williams*, for defendants in error.

Taft, J. It appears from the papers in this case, which have been submitted without oral argument, that Simms had obtained a judgment against Miller, in Louisiana, in 1860-61, when it was dangerous for some people to appear in the courts of that State to defend actions; when the ordinance of secession had been voted. Miller had not dared to make his defense, as he alleges, and the judgment was rendered against him. He set up his case in his answer in this court at Special Term, and the court rendered a judg-

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McGregor v. Mueller & Gogreve et al.

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ment in his favor. Simms applied for a new trial on grounds stated, which seemed to the judge at Special Term sufficient to induce the opening of the judgment.

The judgment against Simms, therefore, was set aside; but the judge immediately dismissed his petition without prejudice.

The plaintiff in error is not content to let the plaintiff in the original suit escape, and he therefore complains that a new trial was granted, and that the plaintiff's petition was dismissed. He prefers to hold him in this forum, chosen by the plaintiff himself.

We are not accustomed to reverse the order of a judge granting a new trial on a motion made at the term when the trial was had and within the rules of the court. The granting of a new trial is so far within the discretion of the judge, in such cases, that it is not ordinarily a subject for proceeding in error.

As to the permitting the plaintiff to go out of court without prejudice, there is no bill of exceptions showing the evidence which had been exhibited to the court, and we do not feel called upon to review the action of the judge in the case.

We have no evidence before us to enable us to determine whether the defendant, Miller, was entitled to an injunction against Simms, to prevent him from using his Louisiana judgment. The judge made him pay all the costs and let him go. We have no means of saying that that was not right.

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JAMES MCGREGOR, Adm'r of Wm. Dunlap, deceased, v.  
MUELLER & GOGREVE ET AL.

On the 13th March, 1850, A. mortgaged to B. real estate to secure five promissory notes, amounting to \$12,000 and interest, and sold to C. the said real estate, who assumed the said notes as part payment of the pur-

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McGregor v. Mueller & Gogreve et al.

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chase money. On the 27th September, 1855, after the last note had fallen due, and while the ten per cent. interest law was in force, C. entered into an agreement with B., to which A. was also a party, to pay ten per cent. interest for one year on the amount, principal and interest, due at the time when the last note fell due, viz: 1st September, 1855, in consideration of forbearance on the part of B. in collecting said notes and in foreclosure of said mortgage, and also in consideration of the extension of the payment of said notes and interest to the 1st day of September, 1856. C. continued to pay ten per cent. interest to March, 1868. The ten per cent. law was repealed April 1, 1859.

*Held*, that this was an agreement for forbearance generally, for which C. agreed to pay ten per cent. interest, and that the time for which ten per cent. is to be paid is not limited in the contract to one year only.

*Held*, also, that the excess of four per cent. can not be charged as a lien on the real estate under the mortgage; but a personal judgment against C., for this excess, can be taken in this case, according to the prayer in the petition.

*Hoadly & Johnson and J. H. Clemmer*, for plaintiff.

*Stallo & Kittredge*, for defendants.

HAGANS, J. Francis Fortman being the owner of lot No. 17, in Symmes subdivision, in Cincinnati, on the 13th March, 1850, mortgaged the same to William Dunlap to secure the payment of \$12,000, as evidenced by five promissory notes, the last one of which fell due September 1, 1855. Fortman sold and conveyed this property to Mueller & Gogreve, who assumed the payment of the mortgage as part consideration of their purchase. On the 27th September, 1855, the parties entered into the following agreement:

“Whereas, by settlement of notes given by F. Fortman, dated March 13, 1850, for \$3,000, payable three, four, and five years after date, with interest on each from September 1, 1850 (except the interest on the *two first* notes for the year ending 1st September, 1855, having been paid); and whereas, said Fortman having sold and conveyed certain real estate described in the mortgage deed from Fortman to William Dunlap, recorded 3d September, 1850, in book No. 157, page 437, of the records of Hamilton county, securing the payment of said notes and interest, to Mueller & Gogreve, who,

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as part of the consideration for said property, assumed to pay said notes and interest. And whereas, said Fortman, and Mueller & Gogreve, the purchasers, for forbearance of suit on said notes aforesaid, amounting, principal and interest, to the 1st day of September, 1855, to \$11,340, after allowing all credits on same. Now, in consideration of forbearance on collecting said notes aforesaid from said Fortman, or foreclosing said mortgage against said Fortman and Mueller & Gogreve, said Mueller & Gogreve agree to pay to William Dunlap ten per cent. interest on the amount due on said notes aforesaid, amounting to \$11,340, including principal and interest, for one year from the first day of September, 1855, payable semi-annually, by the notes of said Mueller & Gogreve—one for \$567, payable in six months from 1st September, 1855, and one for \$567, payable in twelve months from 1st September, 1855—which, when paid, will leave due on said three notes of \$3,000, including interest due on same on settlement as aforesaid, to 1st September, 1855, the sum of \$11,340, which interest notes aforesaid, when paid, will settle the interest on the amount due as aforesaid, from the 1st day of September, 1855, to the 1st day of September, 1856, to which time said notes and mortgage are extended, provided the interest note payable in six months shall be paid, leaving due, in case both of said interest notes shall be paid on the 1st day of September, 1856, on said notes, principal and interest, the sum of \$11,340, and no more. Said Fortman, on his part, agrees to said forbearance and extension of payment aforesaid.

“Given under our hands, this 27th day of September, 1855.

F. FORTMAN,

WM. DUNLAP,

“Attest: *A. N. Riddle.*”

MUELLER & GOGREVE.”

The interest notes mentioned in the agreement were paid, and Mueller & Gogreve continued to pay what was evidently intended to be interest, at the rate of ten per cent., up to March, 1868, together with some payments which must be

applied to the reduction of the principal. So that when suit was brought to foreclose the mortgage—the petition setting up the agreement also—the plaintiff demanded judgment for \$10,505.28, and interest from April 22, 1869; and by an amended petition, for \$10,884.75, and interest from April 13, 1869, at ten per cent. There is attached to the bill of exceptions a statement made by A. N. Riddle, Esq., then acting as attorney for the plaintiff, dated December 30, 1869, which he says is based upon the the case of *Samyn v. Phillips, etc.*, 15 Ohio St. 218, showing a balance due of \$5,618.48, deducting the excess of interest paid over six per cent. from the principal, after the repeal of the ten per cent. law, April 1, 1859. Some oral evidence was also introduced and objected to, detailing interviews between the plaintiff and Mueller & Gogreve, relating to the payment of interest.

On this state of facts, the judge at Special Term found that the plaintiff was entitled to recover \$11,340, with interest from September 1, 1856, at ten per cent. per annum, and that defendants were entitled to a credit for all sums paid on account of interest and to the extent that these payments exceeded interest at ten per cent., on the said principal of \$11,340, and ordered sale. A motion for new trial was made and reserved to this court.

The defendants claim that the findings are erroneous, and that interest at the rate of six per cent. should only be allowed from the 13th September, 1856; and, calculating the amount in this way, that they owe only about \$2,500. As has been said, the evidence shows that the purpose of the defendants was to pay ten per cent. on the principal debt, and they did so up to 1868. The case shows a strong equity that we should consider that the contract. But the parties must stand upon the strict construction of the written agreement made, because to allow a recovery of more than six per cent. interest, unless according to written stipulation, is against the policy of the law. The oral evidence, as well as the receipts of Dunlap for interest, were, on this view, improperly admitted by the judge below. This would

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be sufficient ground for granting the motion for new trial if the defendants are prejudiced thereby, which they are not, if upon the construction of the contract the judge below was right.

The first section of the act of March 14, 1850, provides, "That the parties to any bond, bill, promissory note, or other instrument of writing for the payment or forbearance of money, may stipulate therein for interest receivable upon the amount of such bond, bill, note, or other instrument, at any rate not exceeding ten per centum yearly." \* \* \*

The second section: "That upon all judgments or decrees rendered upon any bond, bill, promissory note or other instrument aforesaid, interest shall be computed till payment at the rate specified in such bond, bill, note, or other instrument, not exceeding ten per cent., as aforesaid." \* \* \*

It is conceded that if the judge was not right in his view of the contract, and if the evidence showed, as we think it did, that payments of interest at the rate of ten per cent., prior to the repeal of this act, were voluntarily made as such, then the defendants were entitled to a deduction of the excess over six per cent. from the principal after that time only. In this view, oral evidence, as to payments and the receipts, was rightly received. *Samyn v. Phillips, etc.*, 15 Ohio St. 218. That was a case of foreclosure of a mortgage, where the notes on their face did not stipulate for the payment of ten per cent. interest after due, though the fact was that the loan was at ten per cent., and interest notes were given for it and secured by mortgage, and the mortgage itself stated it was a ten per cent. debt, and payments were made on the principal after it was due at that rate; yet the Supreme Court held that the action was upon the notes; that the notes constituted the contract; that the mortgage was only an incident to the debt; and that inasmuch as the contract contained no stipulation to pay ten per cent. interest, there could be no recovery for the excess of interest over six per cent. except while the ten per cent. law was in force. This exception was upon the ground that



the parties might do what they could legally bind themselves to do.

It is claimed by the plaintiff that this is substantially a contract for forbearance generally. On the other hand, the defendants claim that it is a contract for forbearance one year in consideration of the payment of ten per cent. interest for one year; that the contract was executed by taking notes for this interest, and the notes have been paid; and that there the matter ended, and the debt no longer, so far as the contract is concerned, bore a greater rate of interest than six per cent. Stress was laid, in argument, upon the frequent recurrence of the word "notes" in the agreement in connection with the stipulations relating to the interest, as lending help in the construction of the contract in this respect.

It was also argued, that if one should give a note payable in five years, with interest at ten per cent. for one year, that it was good for just what it expressed only, and a recovery could be had for no more. That may be so.

What, then, was the contract between the parties? The fair reading of the whole instrument, taking it by the four corners, as is said, is that in consideration of forbearance for one year the defendants agreed to pay interest on the principal debt at the rate of ten per cent. for one year. The giving of notes for the interest can make no substantial difference in the construction of the contract. They were merely evidence *dehors* the contract that it contained such an agreement, and the notes were merely for convenience. It was a very different contract than the supposed five year note. It was rather as if a note was given for one year, with interest at ten per cent. for one year, or "*per annum*" literally, as usually written. It is not doubted that upon such a note judgment could be had for interest at ten per cent. after due, under the second section of the act referred to. At one time it was held otherwise in this court, but now the statement made is undoubtedly the law. We think this was an agreement for forbearance not for one year only,

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but generally, for which the defendants agreed to pay ten per cent. interest; for the time for which that rate is to be paid, is not limited in the contract to one year only, and is therefore within the first section of the act, and judgment should be rendered on it according to the second section.

But should there be an order for sale under the mortgage for the amount found due, according to our views of the agreement? The mortgage does not secure the performance of the agreement, but of the notes named in it. Nothing was said in the argument on this subject, as the defendants are abundantly responsible. This question stands upon entirely different grounds. The agreement is incorporated in the petition, and judgment and order for sale is asked for the amount found to be due under it. The agreement is to forbear foreclosing the mortgage, and it is the notes and mortgage the payment of which is extended. The contract contains no assumption of the debt, but merely recites that Mueller & Gogreve had assumed it in their purchase, and it then bore but six per cent. interest.

There is nothing in the contract, or in the conduct of the parties, that authorizes us to charge the excess of four per cent. as a lien on the real estate.

The plaintiff asks a personal judgment against the defendants in addition to the prayer for an order for sale.

Motion for a new trial overruled, and judgment may be taken accordingly.

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MAYHUGH v. ROSENTHAL.

Geo. W. Mayhugh owned a house and lot in Cincinnati, January 1, 1856, when he left his wife and children in Cincinnati, and departed from the State of Ohio, and was not heard of from February 15, 1859, to October 15, 1868, when he returned home. On the 8th day of February, 1867, when he had been absent and unheard of for eight years, his wife and children conveyed the house and lot in Cincinnati in exchange for a farm in the country.

*Held*, in a suit by Mayhugh to recover the house and lot, that although his

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absence, unheard from, for more than seven years was a ground for presuming his death, yet that presumption was only *prima facie* evidence of his death, and was rebutted by his return, and that the deed of his wife and children was void.

Upon the presumption arising from the seven years' absence, unheard of, the court of probate might have granted letters of administration of Mayhugh's estate and ordered a sale of his real property as of a deceased person, but his title could not be affected without legal proceedings.

The finding, on which the judgment of the court below was founded, was as follows, viz:

1. That Geo. W. Mayhugh, the plaintiff in case No. 24,037, was the owner in fee simple of the premises in question at the date of his departure from the State of Ohio, prior to January 1, 1856, and at the date of the reception of the last information from him, prior to his return therefrom, which last information was received at a date not later than February 15, 1859; that said Geo. W. Mayhugh never made any conveyance of said premises subsequent thereto.

2. That the defendants in No. 24,011, Clarissa A. Mayhugh, Benj. T. Mayhugh, and Chas. Mayhugh, on or about the 8th February, 1867, united in a deed of conveyance of said property to Jno. C. Robinson, plaintiff. The deed drafted by counsel, who represented both parties, described them as the owners thereof, the said Clarissa A. Mayhew as the widow, and said Benjamin and Charles as the heirs at law of said Geo. W. Mayhugh; said Clarissa A. Mayhugh stated to the plaintiff, Robinson, that her said husband had been absent from the State of Ohio more than ten years and unheard of more than seven years, and that he was dead and she believed him to be dead. Relying upon these statements, said Robinson purchased the property from said Clarissa, Benjamin, and Charles, taking a deed with covenants of seizin and general warranty.

3. Said Robinson took said property at the estimated value of \$7,000, and paid therefor as follows: Conveyance to said Clarissa A. Mayhugh, at the request of said Benjamin and Charles, the premises described in the petition,

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situated in Colerain township, subject to a mortgage of \$4,600, and paying to her in cash \$1,600, said Clarissa agreeing to pay said mortgage of \$4,600. She bought personal property from Robinson and paid \$90 out of the \$1,600.

4. Said Robinson expended \$460 in necessary and lasting improvements upon said Richmond street property, and sold the same to S. Rosenthal for \$6,400, who was put into possession on or about the ——— day of ———, 1867, and has been in possession ever since.

5. Said Richmond street premises were worth a rental of \$450 per annum.

6. On or about October 15, 1868, Geo. W. Mayhugh returned to Ohio, and subsequently instituted suit 24,037. He was ignorant of the sale until his return.

7. Said Geo. W. Mayhugh left no other property in the hands of his wife than the premises in question, and made no other provision for her support or that of his children, who were, at the time of his departure, aged respectively ten and twelve, excepting some remittances, the last of which was in a letter dated at Maysville, January 15, 1859, and postmarked February 12, 1859.

Since the return of said Mayhugh he has not lived or cohabited with his wife, nor visited her. He has done or suffered no act ratifying the sale of the lot on Richmond street, nor taken the possession of said property in Colerain township, nor done or suffered any act ratifying the possession of his wife and children of said property. No part of the proceeds of the sale of the Richmond street property has been received by him. Upon this agreed statement of facts, the court at Special Term rendered a judgment for defendant and dismissed the petition, to reverse which judgment this petition in error was filed.

*C. D. Coffin, for Mayhugh.*

*McGuffey, Morrill & Strunk, for Rosenthal.*

*Matthews, Ramsey & Matthews, for Robinson.*

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TAFT, J. The main question to be considered on this finding is, whether Geo. W. Mayhugh, by seven years' absence unheard of, lost the control of his real estate in Cincinnati, so that his wife and children could sell and transfer it without the interposition of a court. Such an absence was *prima facie* evidence of his death. Greenleaf's Ev., secs. 33, 41. Acting upon that evidence, the wife and children undertook to convey the title of his real estate; and relying upon that evidence, Robinson took their deed, and paid a consideration for it by the transfer to them of a farm. If the children and the wife had applied to the probate court for letters of administration they would have been granted, and an order of sale made on the application of the administrator would have been valid by the judgment of the court, and would probably have been conclusive as to the title conveyed. *Newman v. Jenkins*, 10 Pick. 515, 516.

But, without any action of the court, it seems to a majority of the court that the title remained in Mr. Mayhugh, and could not be taken or conveyed away from him by his wife or his children. The *prima facie* evidence of his death disappeared on his return alive to his home in Cincinnati. The presumption of death, arising from seven years' absence unheard of, is not absolute but *prima facie* only. We find nothing in the text books or in the reports to sustain a stronger presumption than that.

Our attention has been called to the statement of a case which has recently arisen in Massachusetts, contained in an opinion of Mr. H. N. Sheldon, published in the October number of the American Law Register, 609, where, after an absence of the husband, unheard of, for more than seven years, the wife married again and lived with the second husband until he died. The heirs of the second husband and the widow by mutual agreement settled the estate, assigning to her a portion of the property, and executing deeds mutually to each other. After all this the first husband returned. The heirs of the second husband sought to set aside the arrangement they had made with the widow, on

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the ground that she was not the legal wife of the second husband.

Mr. Sheldon regards the arrangement as a fair compromise, and as such to be upheld. Nor does he think that the court would consider the validity of the marriage after the decease of the parties to it. This principle has been acted upon in several cases. *Campbell v. Corley*, 21 L. J. Mat. Cas. 60; *Crapsey v. McKinney*, 30 Barb. 47; *White v. Lowe*, 1 Redf. Sur. R. 876, and several other cases to the same effect. We think that the opinion of Mr. Sheldon, as expressed in the article referred to, would be found to be correct if it should come to a judicial decision. But it would not be an authority in this case, in which both husband and wife were living, and in which there is not the feature of a compromise of doubtful rights.

We can find no principle or precedent on which to sustain the validity of the sale and transfer of the real property of Mayhugh in his lifetime, without his consent or the interposition of a court.

The plaintiff, Mayhugh, is entitled to a judgment for the property, subject, however, to the right of Robinson, or the defendant, Rosenthal, to the benefit of the occupying claimants' law, in regard to the permanent improvements which have been put upon the premises by Robinson or Rosenthal.

Robinson, who purchased the property, and paid the consideration, partly in money and partly by the conveyance of a farm, has brought a suit against the sons and wife of Mayhugh, the plaintiff, and against Mayhugh, himself, for relief in respect to the consideration paid by him for the property in question.

As the last-mentioned case is not before us, we can not now decide what relief can be granted upon his petition.

The pendency of that case, however, furnishes no reason why the plaintiff in the present case should not recover his property. On the contrary, the final judgment in this case will furnish a basis of adjudication in that.

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Judgment will be entered in favor of the plaintiff as already indicated.

STORER, J., dissentiente.

These actions, by consent of parties, have been tried upon the same evidence, and as they involve a common principle, they should be together determined upon the facts submitted to the court.

The testimony, as well as the admissions of the parties, are not in conflict, but, on the contrary, leave us in no doubt of the existence of these prominent facts:

*First.* That Mayhugh was living with his wife and children in Cincinnati in the autumn of the year 1856, and that he owned, in fee simple, a dwelling house and lot of the value of \$5,000, which was occupied as the family mansion.

*Second.* Late in that year, and without any apparent cause, the husband left the city, providing no means for the support of his wife and children, other than the rental of the house in which they lived.

*Third.* On the 1st day of March, 1859, a letter was received by Mrs. Mayhugh from her husband, inclosing a small remittance. This letter purported to be written from Marysville, California.

*Fourth.* From that time until 1868, when Mayhugh made his appearance in Cincinnati, he had not been heard from by his wife or any one of his children, though they had meanwhile made every inquiry for his residence, and had written to the place from which he had dated his letter, but no information concerning him could be obtained. In the interim, Mrs. Mayhugh supported herself, educated her sons, and provided their living from the rents of the house, aided by her needle work.

*Fifth.* In the month of February, 1867, more than seven years after the husband had been heard from by the wife or her children, and supposing him to be dead, it was proposed by Mrs. Mayhugh and her children, one of whom had arrived at his majority, and the other would soon be of full

age, to exchange the house and lot with Robinson for a farm in the country. This negotiation ended in a transfer, by Mrs. Mayhugh and her sons, of the Cincinnati property to Robinson, and a conveyance by him to them of the country property.

*Sixth.* The terms of the exchange were upon a valuation of \$7,000 for the city property, and \$10,000 for the farm, a mortgage then resting upon the latter for \$4,600, to be paid by the grantees—Robinson agreeing to pay \$1,600 in cash, to make the exchange equal. That sum was paid accordingly, and possession taken by Robinson of the house and lot in the city, and by Mrs. Mayhugh and her children of the farm.

The contract seems to have been fairly made, and the exchange mutually beneficial to the parties. Deeds with warranty were reciprocally executed, delivered, and recorded.

After this agreement had been made, a year and more intervened when the husband returned to Cincinnati, but has not since resided with his family. He now brings his action to regain the possession of the city property from the defendant, Rosenthal, who had in good faith purchased it from Robinson and paid the purchase money. This is the suit already referred to, which we are to determine, with the other brought by Robinson against Mayhugh, in which Mrs. Mayhugh, her children, and Rosenthal are joined as parties. The object of this last suit is to obtain all the equitable relief that should be granted, either by the abrogation of the exchange referred to, by restoring, if the court should so determine, the city property to the husband, and the farm to Robinson, leaving him to make good his covenants to Rosenthal.

The questions which arise for decision on these facts are alike interesting and novel.

Before the passage of the statute of 1 Jas. II., chap. 1, sec. 2, relative to leases for life, and that of 19 Car. II., chap. 6, relative to bigamy, there was no settled rule as to the period of time that should elapse before the presumption of death



could be allowed. By the civil law the limitation was one hundred years, in case of absent persons; "*quia id finis vitæ longævi hominis est*;" and Swinburne, in pt. 6, p. 445, of his work on Wills, tells us the views of writers on the continent were conflicting—some claiming seventy years, the "three score and ten" of the Psalmist; others still contending a century must have first expired. Subsequently, we find the established term was deemed to be unreasonably long, and became shortened by custom and statute, until the period of three, five, seven, nine, and ten years was adopted in various countries. *Engle v. Emmet*, 4 Bradford, 119.

An inroad was thus made upon the ancient doctrine, by the statutes referred to, which fixed the period of absence in both cases to seven years, enabling the husband or wife, who came within the provisions of the law, to marry again after the period referred to, if no knowledge of the death or life of either existed, and so of the right of the lessee for life, if the same fact appeared. This is now the established law in England.

Thus, "where there is proof of a party's continuous unexplained absence, and the non-receipt of intelligence concerning him in such cases, after the lapse of seven years, the presumption of life ceases, and the burden of proof devolves on the other party." Taylor on Ev., sec. 157.

This period, the same author tells us, was inserted in the statutes referred to upon great deliberation, and has since been adopted by analogy in other cases. A review of the decisions in the English courts upon the point would occupy too much space in our opinion, and we need not quote them at length, as they are all in harmony with each other.

We may, however, select a few. In *Doe v. Jesson*, 6 East, 80, Lord Ellenborough said: "The presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years from the time when they were last known to be living." And so in *Howell v. De Pinna*, 2 Campbell, 113, the same judge holds that "a woman pleading coverture was bound to prove her

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husband was living within seven years next preceding her plea."

The same decision was made in *Doe ex dem., Loyd v. Dukin*, 4 Barn. & Ald. 434, and 5 Barn. & Ald. 86. See also 1 Williams on Executors, 274.

This is the rule, also, so far as we can ascertain it, which prevails in the courts of the United States.

In *McCarter v. Carnel*, 1 Barb. Ch. 46, Chancellor Walworth reviews the cases, and has no hesitation in adopting the limitation of seven years. See also the Vice-Chancellor's opinion, in *Oppenheimer v. Wolf*, 3 Sandf. 573, where the loss of the steamship President and her passengers was presumed, and the same limitation of time clearly stated to authorize the presumption. See also *Engle v. Emmet*, already quoted, in which there is furnished us a most thorough investigation into the reason and propriety of the rule.

The same limitation is adopted in the Supreme Court of Massachusetts, in *Newman v. Jenkins*, 10 Pick. 515.

And the question has been authoritatively adjudicated by the Supreme Court of Ohio, in *Rice v. Lumley*, 10 Ohio St. 596, where it is said "if a man leaves his house or usual place of residence and goes to parts unknown, and is not heard of or known to be living for the period of seven years, the legal presumption arises that he is dead." This would seem to be the same language used by Chief Justice Shaw, in *Loring's Adm'r v. Steiman*, 1 Met. 204, where he ably discusses the doctrine. See also 1 Greenl. on Ev., sec. 47.

If, therefore, I have correctly stated the legal proposition, I may ask what was the condition of the parties when the deeds of exchange were made between them?

It is evident the term required to raise the presumption of death had fully transpired, and the most perfect good faith attended the entire transaction from its commencement to its final consummation.

Mrs. Mayhugh might have applied for her dower, making her children, the only heirs of her husband, parties to the

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action; she might have taken out letters of administration and obtained an order to sell the estate; she could have sought, and might have been granted, a divorce on the ground of the willful absence of her husband. She was absolved from her existing marital engagement so far as to authorize a second marriage, and would have been protected from all the penalties of bigamy. If she had been divorced, alimony would have been allowed her, equivalent, I think, to the full value of the property her husband owned. Should she have availed herself of either of these privileges, the action of the tribunal which secured them would have been final. Having jurisdiction over the subject, and the only parties who in contemplation of law could object, whatever was judicially decreed, the proceedings could not have been collaterally impeached by the husband on his return after so long an absence.

The doctrine as to the finality of the probate of a will is discussed with great ability by Buller, J., in *Allen v. Dundas*, 3 T. R. 129, where it was held by that eminent jurist, sustained by his colleagues, Ashurst and Grose, "that a probate, as long as it remains unrepealed, can not be impeached in the temporal courts, no matter whether the will probated was forged or not; and all acts performed while the probate is unreversed protect the executor as well as those who receive his acquittance for debts due the testator." This case was decided in 1789, but previously, as early as 1749, Lord Chancellor Hardwicke had affirmed the same principle in *Barnsby v. Powell*, 1 Ves. 287.

See also Williams on Executors, 451 to 462; *Westcott v. Cady*, 5 Johns. Ch. 343; and the opinion of Ch. J. Shaw, in *Loring's Adm'rs v. Stiemman et al.*, 1 Met. 244, already referred to. Our own courts have recognized that the principle applicable to the judgments and decrees of every tribunal competent to adjudicate the subject matter, extends equally to the granting letters of administration, or permitting probate of a will. *Ex'rs of Bigelow v. Bigelow*, 4 Ohio,

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138; *Bayless v. Bayless*, 8 Ohio, 239; *Hall v. Ashby*, 9 Ohio, 96. To the same point is the ruling in *Rayland v. Green*, 14 S. & M. 194.

If, then, so far as the wife was concerned, her acts confirmed by a competent court, would confer title upon a purchaser, and protect her from personal liability, what was the position of the husband after his return? Could he demand, as a matter of course, his marital rights, or be restored to the possession of what was once his estate?

When actual evidence of death exists, there is no difficulty in permitting those upon whom the estate falls to exercise their legal rights. But there are many cases where such testimony can not be had to establish what one may well believe is true, while there is yet wanting the positive assurance to justify it, and from the very nature of the fact to be proved, no other or better evidence than presumption can be obtained. Such especially is that which we may infer from a long unexplained absence, implying as it must either death or permanent abandonment. If no limit was, therefore, fixed to authorize this natural conclusion, there would be no settlement of estates; the heir might be indefinitely postponed; the widow be required to live upon "hope deferred," until the ancient rule of the lapse of a century shall have intervened, thus ignoring the rights of parties until new generations have appeared to represent the estate, when it would be difficult to say where it was vested meanwhile—in the dead or the living, or was really "*in nubibus*."

To remedy such a state of things, and establish a rule which changes the presumptive into the actual, we are permitted to hold, after the lapse of seven years, as a fact proved, that a person is dead who has not in the interval been heard from by his family, no matter whether he has absented himself in foreign lands or beyond the Rocky Mountains.

(The object of this new established canon in the law of evidence is to regard the fact as actually proved after the limitation has been reached; and after a diligent examina-

tion of the cases, I can find no instance where the owner of an estate has been allowed to resume his possession, after the presumption of his death legally exists, if the heir or the widow, acting upon that presumption, have asserted their relative rights and conveyed away the estate.

When the strongest presumption of death exists, the mere possibility of life is not to be taken into the account; there can be no legal resurrection.

This view of the law is but the application of the same principle where the existence of grants is presumed; on which statutes of limitation are enacted, guilt or innocence in criminal cases inferred, the adjudications of courts sustained their findings upon the subject matter before them, implying *ex necessitate*, "*Omnia bene et rite sunt acta.*"

All the parties to this controversy are now before us, and it is our duty, in administering their several equities, so to determine that there shall be no failure of justice, no wrong done to any.

We may assume "*in limine*" that there was, on the part of the husband, a virtual abandonment of his family. There was no excuse, no palliation for his conduct during his long absence. He could at any time have communicated with his wife, at least by letter, as the mails were regularly carried from the Pacific coast to every part of the United States. He knew what slender means were provided for the maintenance of those he was morally and legally bound to support. Above all, he knew that the care of his sons, growing up to manhood, rested entirely with the mother. The father was willing no longer to aid in the discharge of so responsible a duty, but, on the contrary, in all the responsibilities of a parent, he was estranged from those he was under the most solemn obligations to honor and protect.

If he had refused or neglected to provide for the support of his family, and his personal liability could not be reached in consequence of his absence, there must be some

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remedy for those he had abandoned, by which his property could be substituted for his person.

Mrs. Mayhugh being the only parent to whom the sons could look for support, neither they nor their mother could be required to pay taxes, insurance, or repairs from the small rental of the property, and thus become the mere servants of the husband and father; or to uphold his estate, at the sacrifice of the mother's health from hard work, or the every-day toil of her sons, so that when the father should return, whether at the end of seven or twenty years, he might enter upon the possession and compel an account of the rents.

I can not admit such a result, when we are bound so to administer the law that the husband's estate shall be charged with the maintenance of his wife and children, and the education of the latter also.

I am satisfied Mrs. Mayhugh might, after the presumption of her husband's death had legally attached, with the aid of her sons, have raised money by a mortgage upon his estate, and appropriated it to the purposes I have indicated. If she was then a *femme sole*, she was competent to contract, and a repentant returning husband could not complain that she and his children had done that indirectly which he was obliged to do directly. Before he could reclaim his property, he ought to discharge the incumbrance created for the special purpose of effecting the object he was by every principle of justice, every duty devolving on him as a husband and a father, bound to have performed, and which, if performed, would have secured his estate from embarrassment, and those who were so near to him from mortification, as well as the sense of dependence. Whenever a wife is driven from her husband's house by his brutal conduct, whether by actual violence or such behavior on his part, morally speaking, as essentially defeats the marriage relation, or if the husband voluntarily leave the family domicile, neglecting to provide for the support of his household, he virtually gives a credit to those who

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have a claim upon him as a husband and father, which in every proper case will be charged upon him or his estate, should he have abandoned his home. This liability can not be denied by him upon whom it legally rests, if it is sought to be enforced by a stranger who may have furnished to the wife and children the means of their support, or by their direct application, if made for relief, by charging the husband's property.

This general principle may well authorize that to be done which was done in the case before us.

This view is in harmony with the doctrine settled by the judges in Wayland's case, early in the reign of Henry IV., which is largely quoted by Lord Coke in his Commentaries, vol. 1, sec. 200, p. 132 *b*, tit. Villeinage. There it was held, when the husband abjured the realm, was banished, or went voluntarily into exile, his wife became a *feme sole*, the *baron* being regarded as civilly dead. Chancellor Kent quotes this decision, with the annotations of Coke, without objection, and refers to the more modern rulings of the English courts on the same point, as that of *Deerly v. Duchess of Mazarine*, 1 Salk. 116, and Lord Raymond, 147; *Walford v. Duchess of Pienne*, 2 Esp. N. P. 554; *De Gaillon v. L'Aigle*, 1 B. & P. 357; *Kay v. Duchess of Pienne*, 3 Camp. 123.

How far the American courts have sustained the principle we may readily learn from the cases to which we now refer. The Supreme Court of Massachusetts, in *Gregory v. Paul, Ex'r*, 15 Mass. 31, in an elaborate opinion delivered by a most able judge more than fifty years ago, cited Wayland's case with approbation and applied it to the case before them. This was where a husband deserted his wife in a foreign country, and she afterward maintained herself as a *feme sole*, in the United States, for five years, and she was there held to be regarded as a single woman. The judge—Putnam—stated clearly what was the effect of exile, abjuration, or banishment:

"The wife might claim dower as a widow. She

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might alien her land without her husband. She is excepted from the disabilities of coverture. She may maintain trespass, sue for her jointure, make her will, and in all other things act as if her husband were dead."

"Miserable, indeed," said the judge, "would be the situation of those unfortunate women whose husbands have renounced their society and country, if the disabilities of coverture should be applied to them while thus deserted."

"The case at bar," continues the court, "comes within the spirit of the rule of the common law, founded on reason and necessity in cases of exile and abjuration, and the wife has the right to acquire property and be permitted to sue and be sued as a *feme sole*."

In *Abbott v. Bayley*, 6 Pick. 89, Chief Justice Parker pronounced the same doctrine in a case very similar.

And subsequently, in *Gregory v. Pierce*, 4 Met. 478, Shaw, C. J., after recapitulating the facts in the case, affirmed the previous rulings of the court, saying: "To accomplish this change in the civil relations of the wife, the husband's absence must be absolute and complete; it must be a voluntary separation from and abandonment of the wife, embracing both the fact and the intent of the husband to renounce *de facto*, and as far as he can do it, the marital relation, and leave his wife to act as a *feme sole*." Again: "The fact of desertion by a husband may be proved by a great variety of circumstances tending, with more or less probability, to that conclusion;" and among these he included, "absence for a long time, not being necessarily detained by his occupation, or business, or otherwise."

A similar conclusion is arrived at by the Supreme Court of South Carolina, in *Bean v. Morgan*, 4 McCord, 148, who quote with approbation the rule laid down by Clancey, in his *Rights of Married Women*, pp. 7-13: "If the husband depart from the realm for the purpose of residing abroad, either voluntarily without an intention of returning, or is compelled so to do without the privilege of returning, such absence renders the wife capable of contracting, and



therefore of ability to sue and be sued, and to acquire and dispose of property as if she were *sole*."

The same doctrine was admitted very fully in *Chapman et al. v. Lemon et ux.*, 11 How. Pr. 235.

In the late case of *Osborn v. Nelson*, 59 Barb. 37, decided the present year, the Supreme Court of New York affirmed the rule to its fullest extent. They say: "The husband did not go beyond the limits of the United States, it is true, but he went to California, and has never since returned to this State or his family, and this is equivalent to abjuring the realm by the husband, at common law, so as to enable the wife to sue and be sued."

On the same principle, the case of *Wagg v. Gibbons*, 5 Ohio St. 580, is to be sustained.

I have said the abandonment by the husband, if it necessitate the same result as would follow his abjuration, exile, or banishment at common law, works his civil death, and the separation between the parties is complete. See *Robinson v. Reynolds*, 1 Vermont, 174, where the cases upon the effect of what the law terms "civil death" are examined and reviewed.

When one is civilly dead he is unknown to the law. His will, at common law, could be probated, his property divided among his heirs or devisees, and it seems legitimately to follow that in such a case as where a husband abandons his wife and children to their individual rights and obligations, he is no longer to be recognized in his conjugal and paternal relation.

It is true the power of no court has been invoked to aid the parties, but in its stead an exchange of property was made more beneficial to all concerned. A farm in the neighborhood of the city was secured, with substantial improvements, containing sufficient land for tillage, where a comfortable living might be earned from its cultivation. The price at which it was estimated was fair, and there was an immediate change of possession when the conveyances were made. In fact, the city property has merely changed

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its name—its value is not practically impaired—and yet the absent husband, with all his delinquencies, neglect, and indifference toward his family, now seeks to recover the city property, without the grace of offering to release the country farm.

Such an experiment, if successful, would ensure to him all the estate he left when he abandoned his family, leaving them to indemnify Robinson and Rosenthal on their covenants of warranty, while the farm will be retained by the family, for which no consideration has been given.

It is clear the wife could not resist her liability on her covenants on the ground of alleged coverture, as she would be required, in such a case, to prove her husband was alive within seven years preceding his return. *Hopewell v. De Pinna*, 2 Camp. 118. The question resolves itself at last into this: Was the exchange made by Mrs. Mayhugh and her sons void, or merely voidable? If the latter, and I think no more can be claimed, the husband must place the parties who claim under his wife and children *in statu quo*. He can not be benefited at the expense of others who acted honestly in the matter, and whose rights, to the fullest extent, we are bound to protect.

This view of the case does no injustice. The wife and children, having invested the fund to which they were equitably entitled for their support, in the property, still retained for their benefit, they ought not, in my opinion, to be deprived of its ownership at the instance of the husband, who had forfeited all claim to the estate by inexcusable absence, I should say voluntary abandonment, until it might have been presumed, upon the soundest principles of evidence, he was no longer alive.

The statute of limitations will run in Ohio against a non-resident, when no other ground than adverse possession intervenes, as we recognize no such exception as absence "beyond seas" to save the bar, and may we not ask if the spirit of that rule does not apply in its highest sense in a

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Ent v. Evans, Lippincott & Cunningham.

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case like this, where there was not only occupation, but a legal right to uphold it?

I am satisfied, from a careful review of all the facts connected with this case, that the plaintiff, George Mayhugh, ought not, either in law or in equity, to be permitted to sustain his action, and we should therefore give judgment for the defendant.

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ENT V. EVANS, LIPPINCOTT & CUNNINGHAM.

In an action for damages for selling without authority mess pork held under the following contract, viz:

"CINCINNATI, November 26, 1869.

"We have this day sold Blackburn Holmes 300 barrels of mess pork (our brand) at \$31.50 per barrel, to be delivered at his option, he paying interest at the rate of ten per cent. per annum. Commission on sale, two and one-half. Storage, six cents per barrel per month. Margin of five dollars per barrel, to be paid us December 20, 1869. Charges to commence from date.

[Signed,] "EVANS, LIPPINCOTT & CUNNINGHAM."

Defendants aver, as a fourth defense, "that they sold said merchandise to the best advantage, and that they had the right under their contract with said Holmes, by virtue of the custom of the pork trade in Cincinnati, which custom was well known to the said Holmes at the date of said transaction, to sell said merchandise for want of margin thereon, irrespective of the orders of said Holmes, the margin having been exhausted at and before said sale, and said Holmes having been notified to renew said margin, and having failed to do so for a reasonable time."

*Held*, that this contract contains no provision for a renewal of the margin, and that a sale made after a demand of a renewal of the margin without notice to the plaintiff of the time and place of sale, was not authorized by the contract, and that a custom of the pork trade in Cincinnati authorizing a sale under such circumstances, without such notice, would be unreasonable and in violation of law.

Whether such a sale could have been justified under such a custom, if the contract had contained a provision for the renewal of the margin, *quære?*

*Stallo & Kittredge*, for plaintiff.

*Matthews, Ramsey & Matthews*, for defendants.

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*C. B Matthews* urged the following points on behalf of the defendants :

1. That the pork was in the hands of these defendants as vendors having a lien upon it for the unpaid purchase money and charges.

2. That the defendants had the legal right to sell said pork upon the default of Holmes.

(a.) The vendor of personal property, where no credit is given, has a lien for the price upon the goods so long as they remain in the vendor's hands. 1 *Parsons on Con.* 526 ; 3 *Ib.* 256 ; *Benjamin on Sales*, 596.

(b.) The vendor's lien is not destroyed by an agreement by him to store the goods. 3 *Parsons*, 258.

(c.) If the vendee refuse to comply with conditions precedent to delivery, the seller may resell them and hold the buyer responsible for any deficit in price. 1 *Parsons*, 534 ; *Smith's Manual of Com. Law*, 180 ; *Chitty Pl.* 813, and notes ; *Ashbrook v. Hite*, 9 *Ohio St.* 357 ; 5 *Johns.* 395 ; 2 *Kent's Com.* 504 ; 15 *Wend.* 493 ; 1 *Sandf.* 297 ; 1 *E. D. Smith*, 590 ; 30 *N. Y.* 549 ; 49 *Barb.* 606 ; 34 *Ib.* 301 ; 29 *Ib.* 315.

3. The influence of custom upon a written contract. *Chitty on Contracts*, 88, note A and cases cited ; 2 *Parsons*, 638, *et seq.*, and 546 ; 9 *Pick.* 197 ; 4 *Met.* 464 ; 11 *Ib.* 186 ; 9 *Ib.* 354 ; 16 *N. Y.* 392 ; 1 *Smith's L. Cases*, 577, and notes ; 5 *Ohio*, 309 ; 16 *Ib.* 513 ; *Leake on Contracts*, 112 ; 6 *N. Y.* 64 ; 1 *Sup. Court Reporter*, 94 ; 6 *Hurl. & N.* 617 ; 2 *Disney*, 482.

**Taft, J.** This suit was brought to recover damages from the defendants, for selling a quantity of mess pork at private sale without orders and without notice of the time and place of sale to the plaintiff, who was the owner. The contract upon which the liability arose was written in the following words, viz :

“ CINCINNATI, Nov. 26, 1869.

“ We have this day sold Blackburn Holmes 300 barrels of mess pork (our brand) at \$31.50 per barrel, to be deliv-

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ered at his option, he paying interest at rate of ten per cent. per annum; commission on sale, two and one-half; storage, six cents per barrel per month; margin of five dollars per barrel, to be paid us December 20, 1869. Charges to commence from date.

[Signed,] "EVANS, LIPPINCOTT & CUNNINGHAM."

The pork, falling in the market rapidly, was sold in February, 1870, at considerable loss. Afterward, the market recovered, and hence this suit for damages under the contract.

The answer states several distinct defenses. The fourth is as follows:

"That the defendants sold the said merchandise to the best advantage to which it could be sold at the dates of sales, and that they had the right, under their contract with said Holmes, by virtue of the custom of the pork trade in Cincinnati, which custom was well known to said Holmes at the date of said transaction, to sell said merchandise for want of margin thereon, irrespective of the orders of said Holmes, the margin having been exhausted at and before said sale, and said Holmes having been notified to renew said margin, and having failed to do so for a reasonable time."

The language of this defense implies that the margin of five dollars per barrel had been put up and exhausted, and that the defendants sold the pork for want of an additional deposit as margin; while the contract seems to contemplate only a "margin" of five dollars per barrel, to be paid defendants December 20, 1869.

The case would stand differently if it had been averred that the original five dollars per barrel had not been advanced December 20, 1869, according to the contract. But it is averred that the usage of the pork trade of Cincinnati authorized the defendants to sell in default by plaintiffs to receive margin, when exhausted, without notice to the plaint-

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iff of the time and place of sale. The plaintiff claims that such a usage would be in violation of law and invalid.

The contract makes no express provision for a sale without authority from the plaintiff, or without notice to the plaintiff; and no such authority can be inferred, unless it can be done, as is now attempted, by showing a custom of trade in Cincinnati. Many contracts are interpreted by the customs of the place where they are made. But there are some things which can not be incorporated in a written contract by custom merely. A custom must be reasonable. It is not always clear what will be regarded as a reasonable custom by the courts. But there have been recent adjudications limiting the operation of custom in explaining or modifying written contracts of this sort.

A mere pledgee of personal property, held to secure a debt, can not sell it on default in payment, without giving notice of time and place of sale. This principle is well established by judicial decisions. The question is, whether the relation of these parties is that of pledgor and pledgee merely.

The most recent, as well as the most important case we have found on this point, is that of *Markham v. Jaudon*, 41 N. Y. 235. That case related to the purchase of railroad stock by the plaintiff, who had paid a margin of ten per cent. upon the amount, and agreed to "keep it good," to the brokers who were to advance the ninety per cent. and carry the stock for the plaintiff. The stock fell, and the margin was exhausted. The brokers notified the plaintiff, and requested him to make good his margin, which he failed to do; and hid himself to avoid service of notice of the time and place of sale. The sale was made without such notice, at a loss of \$5,000. Soon after, the stocks rose in the market to the former price, and a suit was brought against the brokers. It was held by a majority of the court that the plaintiff was a pledgor, and the defendants were pledgees; that the stock was the property of the plaintiff pledged to the defendant as security for the repayment of

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their advances, and that a sale by them, except upon judicial proceedings, or after a demand of repayment of the advances and commissions, and a reasonable personal notice to him of their intention to make such sale in case of default in payment, specifying the *time and place* of sale, was a wrongful *conversion* by them of the property of the plaintiff.

It was also held, that *evidence of a usage* that stock so held might be sold without notice to the broker whenever, by the fall of the stock in the market, the "margin" was exhausted, was inadmissible, such usage being in direct variance with the settled rule of law applicable to the case.

This was a case of great importance in its bearing upon the enormous transactions in the New York stock market. In that case, as in this, there was no express authority given in the contract that the defendants might sell without notice, if the margin was not kept good. In this respect both these cases differ from the case of *Patterson v. Keys*, decided by this court, 1 Superior Court Reporter, 94. In the last-mentioned case, there was express power given to sell, if the margin was not kept good. In that case, this court held, in Special and General Term, that the broker might sell when it was necessary to protect himself, after notifying the owner of the property to advance the margin.

In the case of *Markham v. Jaudon*, there was an express stipulation on the part of the pledgor, to "keep the margin good," which is wanting in the contract we are considering.

The defendants aver a notice to the plaintiff to *renew* said margin, and that by the custom of the pork trade in Cincinnati they were authorized to sell under such circumstances, without the consent of the plaintiff, and without notice of time and place of sale.

Prior to the decision of the case of *Markham v. Jaudon*, as reported in 41 N. Y. 235, the question involved in that case had been decided the other way in two recent cases, in the Supreme Court of New York, viz: in *Sterling v. Jaudon*, 48 Barb. 459, Ingraham giving the opinion, and holding,

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that "in such a transaction no notice was necessary of the time and place" of sale; and in *Hanks v. Drake*, 49 Barb. 186, in which it was held, "that, under such an agreement, the notice which the law requires in the case of the sale of *pledged stock*, as security for the payment of a sum of money advanced thereon, is not required in such a case."

It is also to be mentioned, that in *Markham v. Jaudon*, 41 N. Y. 235, there were two strong dissenting opinions which sustained the position taken by the Supreme Court, holding that the agreement of defendants to hold or carry the stock was dependent on the plaintiff furnishing them with the means to do so, and that when the plaintiff failed in that respect the obligation to hold the stock ceased, and the right to sell was complete—in short, that the relation of the parties is wholly by force of a mutual and dependent contract.

They further held, that if the construction of the contract was doubtful, the evidence of the usage in regard to such contracts, prevailing in Wall street, was competent to show the true interpretation of the contract as understood by both parties.

The weight of authority, at present, would seem to be in favor of the conclusion announced by the majority of the court. But the facts, as stated in this fourth defense, do not require us to pass upon that precise question, as here is no express provision that the margin of five dollars shall be kept good or renewed; and the custom in the present case would have to supply not only the want of an express authority to sell without notice of time and place of sale, but also the want of a promise to *renew* the margin.

This, we think, is going too far. Without committing ourselves, therefore, to the doctrine of the majority of the court in *Markham v. Jaudon*, we sustain the demurrer to this fourth defense, as not stating facts sufficient to bar the action.



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Rankin v. Knight.

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## RANKIN v. KNIGHT.

Hamilton and Knight were accustomed to accommodate each other by an exchange of checks or notes. Knight gave Hamilton, who wanted to raise money, his check for \$1,210, on a bank, payable to the order of Hamilton, and at the same time took from Hamilton a like check, payable to his (Knight's) order, on the same bank, for the same amount. Hamilton transferred Knight's check to a creditor as collateral to an existing debt.

*Held*, that the check was not to be considered as accommodation paper, and that H.'s creditor was entitled to collect the check from Knight, although Knight had not transferred or brought suit on the check which he had received and held from Hamilton.

*Peck & Halstead*, for plaintiff.

*H. Snow*, for defendant.

Taft, J. This was an action to recover the amount of the following draft, viz:

“CINCINNATI, December 31, 1869.

“E. Kinney & Co., pay to Jno. E. Hamilton, or order, twelve hundred and ten dollars. (Signed),

“\$1,210.

N. S. KNIGHT.”

Indorsed: “Jno. E. Hamilton.”

The petition alleges that payment was demanded and refused. It also alleged that the consideration of the check was an indebtedness of the defendant to Hamilton, which was then due, and equal to the amount of the said check.

The answer of the defendant denies that there was any consideration for the check, and avers that it was merely for the accommodation of Hamilton, and denies the indorsement by Hamilton, and says that if it was indorsed it was done without consideration, and that the transfer by the bank to Rankin, the plaintiff, was without consideration also.

The case was submitted to the judge at Special Term, who

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found for the plaintiff the amount of the check with interest.

A motion was made for a new trial, which has been reserved to the General Term on an agreed statement of the evidence.

It was in evidence, that Hamilton and Knight, one of whom resided in Covington and the other in Cincinnati, often assisted each other financially by paper like that on which this suit is founded. A little time was gained by the transmission across the river, from one State to the other. When Hamilton gave to Knight a draft or check of this kind, he took one of like amount from Knight, and *vice versa*. Such was the fact in the present case. Knight gave Hamilton this check for \$1,210, which Hamilton wished to use, and was to provide for when it reached E. Kinney & Co., on whom it was drawn, in Cincinnati. But at the same time Knight took from Hamilton a check, on the Farmers' Bank of Kentucky, for the same amount, which, in their testimony, they call a memorandum check.

It seems that the occasion for resorting to this way of raising money was that Hamilton had had a draft for \$1,200, on which the plaintiff, Rankin, was accommodation indorser, discounted at the Farmers' Bank. This draft had been protested for non-acceptance, and Hamilton left this check of Knight with the bank, to be collected and the money applied to the payment of his own draft, indorsed by Rankin, making the amount \$1,210, so that the excess of \$10 might pay expenses. At first he did not indorse the check, though it was payable to his order, but afterward he did indorse it, at the request of the bank, as it seems to us probable from the evidence.

The bank compelled Rankin, by suit and judgment, to pay the protested note, and then passed over to him the note, together with this check, which it held as collateral to it. Neither the bank nor Rankin had notice of the peculiar origin of the check.

The court, at Special Term, regarded Rankin as a *bona*

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*fide* holder of the check, without notice of anything in its origin giving it the character of accommodation paper, and found, accordingly, that the plaintiff was entitled to recover.

It is now urged that this check was mere accommodation paper, and passed to the bank as collateral merely to the protested note, without any giving of time or other consideration on the part of the bank, and that it falls within the case of *Roxborough v. Messick*, 6 Ohio St. 448, which decided that a holder of a collateral note, taken to secure an existing debt, is not a holder for valuable consideration, and that Rankin took the right of the bank only, and stands in its shoes. This position would seem to be well taken, unless this check is to be considered as given for value.

What, then, is the relation of parties who exchange their paper in the way which was adopted by Hamilton and Knight? Were both checks accommodation checks, or was one a consideration for the other, so that suit might be maintained by one against the other?

If Knight had sold or procured a discount of the check of Hamilton, he would have had no defense in a suit even by Hamilton against him on this check. But as he held it as a memorandum check, as they call it, can he, Knight, be regarded as standing in a better condition?

It appears, in fact, to be the common case of cross notes or cross checks—one given in consideration of the other. The liability of one was the consideration for the promise of the other, and, therefore, the paper must be regarded as valid, negotiable paper, founded on a valuable consideration. To this point authorities are not wanting. *Cowley v. Dunlop*, 7 T. R. 565, 9 E. 190, and *Buckler v. Bretivant*, 8 E. 72, where it is held that the cross notes are to be taken as showing the contract between the parties, and "that the law will not raise any promise *extra* the notes or bills," which are evidence of absolute debts. *Eaton v. Carey*, 10 Pick. 214; *Dowe v. Schutt*, 2 Denio, 623. In *Whittier v. Eager*, 1 Al. R. 499, the court say, Bigelow, J., giving the opinion of the court, "Nothing is better settled than that a

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promissory note, given by the maker in exchange for a note given to him by the payee, is for a good consideration, and is in no proper sense an accommodation note, although made for the mutual convenience of the parties. *Higginson v. Gray*, 6 Met. 218. Being a valid note, on which the defendant was liable, it was wholly immaterial whether the plaintiff, as indorsee, took it for value." To the same effect are *Trustees v. Hill*, 12 Met. 462; *Fields v. Stemston*, 1 Cold. (Tenn.) 40; *Burdson v. Benton*, 9 Q. B. 828.

It would seem to follow that this check was a valid check in the hands of Hamilton, given for a valuable consideration, viz: his liability on his check given to Knight, unless there are other circumstances to render the principle of cross notes or checks inapplicable, and Hamilton was entitled to use it. He did transfer it to the bank as collateral to the protested note, and the bank transferred it to the plaintiff, who had paid the note for Hamilton's accommodation to secure him in the same way the bank was secured by it.

Such is the conclusion to which a majority of the court has come, although it has not been without difficulty. One of the difficulties in adopting the conclusion we have stated is, that the check upon the National Bank, given by Hamilton in exchange for that on which this suit is founded, was not stamped; and the question arises, whether this want of a stamp made it void. If it was void, it would not amount to a consideration for the other check. But unless the omission to affix the stamp was intended to defraud the revenue, the paper was not rendered invalid by it. Upon the principle of *Harper v. Clark*, 17 Ohio St. 190, we do not think that this paper was invalid for want of the stamp. Besides, Knight could have put on the necessary stamp and canceled it as well as Hamilton.

Another difficulty in the case is, that it is stated that this check of Hamilton was a memorandum check, and was not to be presented to the bank. This presents a more serious objection to our theory of the case. We are satisfied that the exchange of checks was made on this

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occasion at the instance, and for the special accommodation, of Hamilton. And it would seem probable that it was not expected that Knight should present Hamilton's check to the bank on which it was drawn. But we can not suppose, from the whole transaction, that it was the purpose of the parties that Knight should not be at liberty to present the check, especially if Hamilton failed to provide for the payment of Knight's check. We must take the transaction to be as evidenced by the papers. Knight had the legal power to use the check of Hamilton, and we can not adopt any other theory of the transaction than that it was actually intended that the power should be used if found necessary.

It is proper to add that, at the time of the exchange of these checks, viz., December 31, 1869, there was an indebtedness from Knight to Hamilton, on other transactions, of \$278.78, although this balance was afterward changed, before this suit was commenced, and before the plaintiff received the check from the bank, so that there was a balance of \$83.97 in favor of Knight against Hamilton.

But we prefer to found our opinion upon the ground that these exchange checks were valid and available as checks given for a valuable consideration. The fact that Knight now produces Hamilton's check and attaches it to the evidence in the case, can not make a difference.

STORER, J.; dissented.

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ANNA JACOB v. THE CONTINENTAL LIFE INSURANCE CO.

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A married woman suggested to her husband the taking out of a policy of insurance on his life for \$10,000, and gave him her own money to pay the first premium. The husband signed the application in his own name, and shortly after became bankrupt and died; but in all other respects the risk was in her own name, and in accordance with the inten-

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tion of the wife, who paid the first and all the subsequent premiums out of her separate estate, for which the company issued receipts to her.

*Held*, that this insurance is within the second section of the "act relating to insurance on life for the benefit of orphans and widows" (1 S. & C. 737), which allows the wife, by herself and in her own name, to insure her husband's life in any amount, for which she can pay the premiums out of her separate estate; and she is entitled to the insurance money, free from the claims of her husband's creditors.

That in making the application the husband acted as the agent of the wife, which fact, on the face of the transaction, the company was bound to know.

On error to the Special Term, to reverse the judgment of the court below, in favor of the plaintiff.

The facts appear fully in the opinion of the court.

*Forrest & Lindemann*, for plaintiff.

*Okey & Taylor*, for defendants.

HAGANS, J. This was a suit upon a policy of insurance on the life of Louis Jacob, Jr., the late husband of the plaintiff, for \$10,000, in the name and for the sole use of the plaintiff.

It appeared on the trial that the deceased was insolvent at the time of his death, having before made an assignment for the benefit of his creditors; that the premiums were paid out of the plaintiff's own separate estate; that the policy was taken out at the instance of the plaintiff, who furnished her husband with the money, though he paid the first premium, before he made the assignment, with his check. The policy recites that the premium was paid by the plaintiff. The other premiums were paid by plaintiff, as evidenced by the receipts of the defendant to her, and out of her separate funds. It also appeared that the plaintiff had another policy on the life of her husband, to the amount of \$5,000, in the Atlantic Mutual Insurance Company, the annual premiums for which were \$136.65. This loss she had received. The application for

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the risk sued on was made to the defendant by Louis Jacob personally, and is signed by him with his own name.

An administrator of Louis Jacob was appointed and made party defendant. He answers, by the plaintiff's counsel, that he believes the plaintiff paid all the premiums out of her own separate funds, and that no creditor of Louis Jacob had presented any claim to him.

One Frederick Rau, who is admitted to be a creditor of Jacob to the amount of \$700, files an answer denying all the allegations of the petition relating to the payment of premiums, and insists that the money should go to the administrator, to be distributed according to the laws relating to the administration of estates.

The defendant answers that Louis Jacob paid the premiums; sets up the payment of the loss to plaintiff by the Atlantic Mutual Life Insurance Company of \$5,000; that it is the holder of an unpaid note, indorsed by Louis Jacob, for \$1,500, and asks that the loss for which it is liable be credited with the amount thereof, and avers a willingness to pay to plaintiff, if adjudged that she is entitled to it; but also avers that the administrator of Jacob is entitled to the money, less the indorsed note aforesaid.

No question is made except upon the first and second sections of the "act relating to insurance on life for the benefit of orphans and widows." 1 S. & C. 737.

It is said by the defendant that this insurance falls under the first section of the act referred to, which authorizes any one to effect an insurance on his life, to inure to the sole benefit of his widow and children, exempt from all claims by his representatives and creditors, provided that the annual premium paid does not exceed \$150. It is admitted, under this claim, that the plaintiff would be entitled to a portion, say \$1,000, of the recovery here, as the premium on the policy in the Atlantic Mutual Insurance Company, which plaintiff has collected, was only \$136.65. But clearly, under the testimony, this insurance was effected by the plaintiff, and the premium paid by her and not by

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her husband. She suggested the taking out of the policy. She furnished the money to pay the premium. When it was issued, though the husband gave his own check for the amount, confessedly, by the admission of the policy, as well as by the testimony, she paid the first premium, and by the receipts, the subsequent premiums, out of her separate estate, and the company shall not now gainsay it. It would seem, therefore, that the case falls within the second section of the act referred to. It is objected in this view that the application is signed by Louis Jacob. But he acted as the agent of his wife, and the company must be held, from the face of the transaction, to have known it. He could not, by the mere fact of signing the application in his own name, in her absence and without her knowledge, defeat the intention or the rights of his wife, as the policy is issued in her name. His act, under the testimony, was her act; and it would be inequitable, as well as contrary to the statute, to allow his personal representatives or his creditors to reap the fruits of the investment of the wife's money. "It can not be claimed that, from the mere relation of husband and wife, a *feme covert* is bound, in respect to her separate property, by the admission or declaration of her husband." *The Fraternal Mutual Life Ins. Co. v. Applegate*, 7 Ohio St. 293. The second section of the act referred to provides that a married woman may, by herself and in her own name, from her separate property, cause to be insured for her sole use the life of her husband, and the amount of the insurance shall be free from all claims of her husband's representatives and creditors.

The first section very properly limits an insurance to her use to an amount represented by \$150 of premiums, when the husband effects it and pays for it, and where the rights of his creditors are involved.

The second section, however, allows the wife to insure her husband's life in any amount, for which she can pay the premiums out of her separate estate. She is to be treated



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Bates v. Commercial, etc., Insurance Cos.

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in these respects as a *feme sole*, and the insurance is her separate property.

The case clearly falls within the second section, and the judgment below must be affirmed.

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JOHN BATES v. COMMERCIAL INSURANCE COMPANY.

JOHN BATES v. MAGNOLIA INSURANCE COMPANY.

JOHN BATES v. CENTRAL INSURANCE COMPANY.

JOHN BATES v. BUCKEYE INSURANCE COMPANY.

Bates sold the Louisville Theater to Fuller, retaining a lien by the deed for \$26,000 of the purchase money, and providing that Fuller should keep on the property insurance in \$10,000, loss, if any, payable to Bates, on which policies Bates brings suit. Before the fire, Fuller sold and conveyed the property for \$75,000 to Mark Munday, retaining by the deed a lien for \$50,000, with the condition that Munday should keep the property insured in \$10,000, loss, if any, payable to Fuller.

*Held*, that the interests of a mortgagee and mortgagor are entirely distinct, and that the insurance procured by Munday, under his arrangement with Fuller, did not avoid the policies for \$10,000 procured by Fuller under the arrangement with Bates, notwithstanding the provision in said policies that "in case the insured or assigns should make other insurance without consent of the defendants," the policies should be void.

That the word "assigns," in this clause, means assignees of the policy, and not assignees of the property.

That the sale to Munday by Fuller, he retaining a lien for \$50,000 of the purchase money, did not avoid the policy issued by one of the defendants to Fuller, which contained the clause that "a transfer or change of interest of the insured, either by sale or otherwise, without consent of the defendant" should avoid the policy. The interest was not "transferred or changed" within the meaning of that clause in the policy.

*Logan & Randall, and Jordan, Jordan & Williams*, for plaintiff.

*Lincoln, Smith, Warnock & Stephens*, for defendants.

The following is Judge Taft's opinion, delivered at the December Special Term :

TAFT, J. These four actions are each founded on a policy of insurance for \$2,500, on the theater in Louisville, formerly owned by the plaintiff, but owned, when the original policies of which these are renewals were issued, by Geo. F. Fuller.

The petitions are alike, and severally set out that the plaintiff sold the theater to Geo. F. Fuller, reserving a small rent of \$100 per annum, and a lien for \$26,250 of balance of the purchase money; and that the deed of transfer also contained a clause providing that Fuller should keep the property insured for four years in the sum of \$10,000, and assign the policy to plaintiff to secure the payment of Fuller's indebtedness to him.

That Fuller procured the insurances in the several companies of several defendants, \$2,500 in each; that the premises have been burned; that the plaintiff has fulfilled and performed all the conditions, and asks judgment for the several amounts.

The first, second, third, and fourth defenses are alike in all the answers. The Buckeye Company only adds a fifth, depending upon an additional clause in its policy.

The first defense states the provision which each policy contains, "that if the insured or his assigns should thereafter make any other insurance upon said property, without the consent of the company indorsed on the policy, or otherwise acknowledged by them in writing, the policy should cease and be of no further effect; that upon the face of the policy in each case there was permission for \$7,500 more insurance, which had been procured by the plaintiff, making the total of \$10,000; and that these policies had been kept alive by renewals till the fire; but that after procuring them, Fuller procured \$10,000 more insurance on the same property in other companies without notice to defendants, which insurance he had collected of said

other companies since the fire, thus avoiding the policy on which this suit was brought.

To this defense, as well as to all the others, a demurrer was filed. But it was held by the court on the argument at the former hearing upon the demurrer, that the averments of this first defense brought the case within the prohibition of "other insurance," and the demurrer was accordingly overruled.

The second defense, after reciting the same provision against "other insurance," avers that Fuller had sold the property since the issuing of the policy to Mark Munday and two others for \$75,000, retaining a lien for \$50,000 of unpaid purchase money, and providing that the said purchasers should procure insurance in \$10,000, loss, if any, payable to Fuller, which was done, without notice to the defendants, in violation of the provision against other insurance.

It is also averred that Munday, soon after the purchase from Fuller by the three, purchased out the other two purchasers, and at the time of the fire owned the whole, subject to the lien aforesaid in favor of Fuller.

The demurrer to this second defense was sustained at the former hearing, on the ground that the insurance procured by Munday on his interest was not "other insurance" made or procured by Fuller within the meaning of the provision in the policy, although the loss was payable to Fuller; that the insurance was on a different interest from that of Fuller; and that in order to bring the case within the prohibition, the additional insurance must be on the same, or part of the same interest of the same party.

As the third defense, it is averred that there is a condition against prior as well as future "other insurance," and that the plaintiff, when his policy was renewed, failed to advise the defendant of the existence of the insurance procured by Mark Munday, or of the transfer of the property to him, and that the condition in the policy required the representation of such changes upon renewals, on penalty of making

void the policy ; and that the defendants would not have renewed the policy if they had known the facts.

As a fourth defense, it is averred that Fuller represented that he was the owner of the property, and that when the policy was renewed, he did not advise the defendants that the ownership had been changed by sale to Mark Munday, and that as by the provision of the policy every renewal is deemed to be made upon the original representations unless they are expressly changed, this was a misrepresentation and made void the policy.

In the answer of the Buckeye Insurance Company, it is alleged, as a fifth defense, that the policy in that case contains a provision that "in case of any transfer or change of interest of the insured, either by sale or otherwise, without consent of defendants, the policy shall thenceforth be void and of no effect ;" that the policy also contains a provision that all renewals shall be considered as made under the original representations, unless varied by new representations in writing ; that at the making of the original policy, in June, 1864, the property was represented as owned, and was owned, by Fuller, and was insured as his ; that on the 19th September, 1864, Fuller sold and conveyed to Munday, Calvert & Carey ; that on the 4th April, 1865, Calvert and Carey sold and conveyed to Munday, who owned the property at the time of the fire, of which the defendants had no notice. The policies issued by the other three companies have no such clause as that on which this fifth defense is founded, and their answers do not contain this fifth defense.

The case was elaborately argued upon the demurrer to these defenses. But that argument was confined chiefly to the second defense. The demurrer to this defense, as has been remarked, was sustained. The demurrer as to the other defenses was overruled, and issues have been made. The evidence has now been heard, and the whole case has been argued upon the evidence and the law.

The policies have been put in evidence, and contain the

clauses which the answers represent them to contain. The history of the making of the contracts of insurance has been proved by the testimony of Mr. Fuller and of Mr. Hurlburt. It appears that there was no formal written application and representation for insurance, and I am of the opinion, from the weight of the evidence, that the policies were retained here in Cincinnati, and were not forwarded to Fuller, at Louisville, so that he did not see, personally, how the policies were drawn or how the property was described. Mr. Hurlburt, the president and agent of the Buckeye Company, made the contingent arrangement with Fuller, at Louisville, in a sort of casual and informal way, and Fuller wrote to Bates, to inquire into the sufficiency of the company, and Bates being satisfied, the policies were issued without any more formal or specific representations, the parties having confidence in each other's good faith; and when the policies needed renewal, Bates paid the premium and drew on Fuller to reimburse himself. In the meantime, as is alleged on behalf of the defendants, Fuller sold the premises to Munday and others, retaining a lien thereon for \$50,000 of the purchase money, and requiring an insurance to be kept by the purchasers, of \$10,000; loss, if any, payable to Fuller for his security—and these transactions were not made the subject of representations to the companies.

I find no evidence that the risk was in any measure increased by this change. There is nothing in the character of the purchasers or of Munday, to make the moral risk or any risk greater than it would have been if the property had not been sold. Fuller remained interested in the property so largely beyond all the insurance, that there could not be supposed to be any appreciable increase of risk on the ground of his want of interest.

Nor can I find that the failure of Fuller to represent the fact of his sale to Munday, and the further fact that Munday procured the insurance in his own name, under the circumstances stated, was a misrepresentation or a concealment of a fact material to risk. Nor do I find any such want of

representation of Bates' relation to this property, and to Fuller, as to impair the validity of these policies.

We come, then, again to consider the defense of "other insurance."

The interest of Bates, in the present case, was that of a mortgagee, and Fuller's interest was that of mortgagor, so far as the original policies, of which these policies are renewals, were concerned; and as between Fuller and Munday, Fuller was the mortgagee and Munday the mortgagor. The form of conveyance used was that common in Kentucky and some other States, where, instead of a separate deed, and a separate mortgage deed back to secure the purchase money, the deed itself which conveys the title retains a lien to secure the purchase money. But the relation of the parties to the transaction are not different from that between the vendor of real estate, who takes back a separate mortgage to secure the purchase money under the forms of conveyance usual in Ohio.

The interests of Fuller and of Munday were distinct, as were the interests of Bates and Fuller; and when Fuller procured the policies of insurance, and assigned, or made the loss, if any, payable Bates, to secure his indebtedness to Bates, it was the interest of Fuller and not of Bates which was insured; and, although Bates was authorized to collect the loss and apply it to the payment of the lien, Fuller was the party bound to keep the conditions of the policy. The insurance was his. Though Bates was entitled to collect the money, it was to pay Fuller's debt. 31 Pa. St. 438; 17 N. Y. 39.

The interest insured was entirely distinct from that of Bates as mortgagee, whose only interest was his claim. This he might have had insured, and in case of loss the company, on paying the loss, would have been subrogated to his right as mortgagee, to the extent of the loss paid. But when a loss happens under a policy on the mortgagor's interest, like this, there is no subrogation to rights against others.

It is the property itself which is insured, and not a mere debt secured by a lien upon it.

The distinct nature of the interests of mortgagee and mortgagor is well explained by Judge Story in the case of *Carpenter v. Providence and Washington Insurance Co.*, 16 Pet. 501. The case of *Woodbury Savings Bank v. Charter Oak Insurance Co.*, 81 Conn. 518, decided that where the mortgagee had procured a policy on his interest, the condition against further insurance was not violated by a policy procured by the mortgagor on his interest. That was sustained by the authorities undoubtedly, and by principle.

The word "assigns," as used in this clause of the policy, "if the said insured or assigns shall hereafter make any other insurance upon said property," means not assignees or transferees of the property but of the policy. This construction is reasonable, and has been settled by authority. *Holbrook v. American Insurance Co.*, 1 Cur. 198; *Wilson v. Hill*, 3 Met. (Mass.) 66-68.

The question of "other insurance" is not in this case affected by the word "assigns," as there are no assigns of these policies who have obtained other insurance. The question, whether there has been "other insurance" in this case, obtained by or for Fuller, in violation of the policy, I have again examined as well as the pressure of the business of the term would permit. The precise facts of this case are not to be found in any of the adjudicated cases, and present the question of "other insurance" under novel circumstances, and in a way, perhaps, to leave it not quite clear of doubt. But, having regard to the principle upon which courts uniformly construe these conditions in a policy, favorably to the insured, to avoid a harsh and inequitable forfeiture, I conclude that the policies obtained by Mark Munday, on his interest in the property, loss, if any, payable to Fuller, to secure the payment of purchase money, were not "other insurance," "made by Fuller or assigns," "upon said property," and, therefore, did not fall within the prohibition of this clause in the pol-

icy. I think this conclusion is sustained by principle, and is not inconsistent with the precedents.

The case most relied upon by counsel for the defendant, and which most nearly supports his position, is that of *Holbrook v. American Insurance Co.*, 1 Cur. 193. There are, however, differences between that case and the present, which will not permit us to follow it as authority here. One difference, which is of itself sufficient to distinguish it, is that in that case the insured, who had sold the insured property himself, paid the premium for the "other insurance" on the property sold. Such was the hypothetical case put by the judge in his charge to the jury. Here the premium is paid by Munday, and the insurance was procured by him on his own interest and for his own benefit, although the loss, if any, was to be applied on his debt to Fuller. Judge Curtis gave it, in charge to the jury, "that if the insurance obtained by the purchasers (Shepherd, Wright & Ripley) nominally covered the whole property, and not merely their interest in it, and they were in any manner authorized by the plaintiffs" (the insured) "so to insure, if there was any agreement between the plaintiffs and Shepherd, Wright & Ripley that the former" (the plaintiffs) "would pay the cost of insuring the special interest of Shepherd, Wright & Ripley, or any part of it, then there was subsequent insurance within the meaning of the policy, and the plaintiffs could not recover."

The language of the judge, in his charge, seems to be a little more guarded than some of the remarks preceding it, which came nearer than any decision I have seen to confounding the interests of the mortgagor and mortgagee. Nevertheless, the better opinion is, that for purposes of insurance they are entirely distinct, and never to be confounded. Involving, as this question does, a forfeiture of all rights under the policy, without increase of risk, the court is bound to give a liberal construction of this clause in favor of the insured. It is in accordance with the current of judicial authority.



It remains to consider the fifth defense in the case against the Buckeye Company, that the policy is forfeited by "a transfer or change of interest of the insured, either by sale or otherwise, without consent."

This question was not argued on the former hearing upon the demurrer. The evidence shows that Fuller sold and conveyed the property for \$75,000, retaining, however, his lien for \$50,000 of the purchase money. If this did not involve a forfeiture, it is probable that this might be regarded as a change in the interest of the insured, although there can be no doubt that he retained a very large insurable interest. He is to be regarded as having retained the entire property, so far as the security of the purchase money was concerned. Regarding the real objects of the parties, and their relation to each other, we can not find such a change of interest here, by sale or otherwise, as to avoid this policy.

Courts have held that where the property insured was sold and conveyed by a deed absolute in form, and at the same time has made a mortgage back to secure the purchase money, the two deeds are to be regarded as one, and the vendor is to be regarded as holding his title unchanged, so far as his insurance was concerned. There are many cases which may be regarded as authorities to this point.

In *Hitchcock v. Northwestern Insurance Co.*, 26 N. Y. 68, the words were, "in case of any transfer, or termination of any such interest of the assured, either by sale or otherwise, without consent." It was held that a sale and conveyance, and a mortgage back to secure the purchase money, was not such transfer and termination of the interest as to affect the policy.

In *Ætina Insurance Co. v. Jackson & Co.*, 16 B. Mon. 255, the language was as stated by the chief justice, Marshall, p. 255, "that in case of any transfer, or change of title in the property insured by this company, such insurance shall be void."

The property consisted of chattels, but it was sold and the

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ownership was changed, though the insured retained the possession with a lien for the price. Held, that the property was not "changed," within the meaning of the policy. But a clearer case is that of *Kitts v. Massasoit Co.*, 56 Barb. 177. The words were, "and in case of any change of title in the property insured this policy shall cease and determine"—p. 178. The court held that there was no difference between these words and the words "transfer or termination," used in 26 N. Y. 68, and in several other cases. The court say, on p. 184, "Now, if the sale and taking back a mortgage for the purchase money did not 'transfer' the title, how can it be said that such an act 'changed' the title? Can there be a change of title, within the meaning of the policy, by an act which does not 'transfer' the title—a change without a transfer?"

The language in the present case, I am satisfied, must bear the same construction; and that the sale by Fuller, retaining the title by way of a lien for \$50,000 of the purchase money, was not a forfeiture of the policy.

I have placed my opinion upon the construction of the language of the policy. But the informal manner in which the application was taken by the agent of the defendants, and without written representation, together with the other circumstances in evidence, as to the origin and continuance of the insurance, might well be considered on the further question, whether in the present case there has not been a waiver on the part of the defendants of strict representation and of notice of any supposed change of interest or of other insurance without increase in risk.

If the case is taken up on error, the bill of exceptions ought to include all the parol testimony bearing on this last feature of the case, as well as the documentary evidence, so that each party may have the benefit of the case as it has been proved at the trial, however the opinions of different courts may chance to differ.

I find, then, for the plaintiff in each case, for the full amount of the policy and interest.

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Irwin v. Garretson.

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## JAMES IRWIN, Adm'r, v. JESSE GARRETSON.

The statute of limitations may be pleaded against a set-off.

If a cause of action, which has been pleaded as a set-off, accrued in the lifetime of the plaintiff's intestate, the running of the statute of limitations was not interrupted by the death of the intestate against whom the action accrued.

If the facts constituting a bar by the statute of limitations appear on the face of the pleading, it may be taken advantage of, either by a general demurrer or by an answer setting up the statute; but if not met by one or the other, the defense of the statute is waived.

This suit was brought upon a promissory note made by the defendant. The note was for one thousand dollars, as follows:

"\$1,000.

CINCINNATI, January 1, 1864.

"One year after date, I promise to pay to the order of Catherine Seybold one thousand dollars, for value received, with eight per cent. per annum interest from date.

(Signed,)

"JESSE GARRETSON."

Indorsed: "Received, February 22, 1867, on the within note, \$500."

(Signed,)

J. F. IRWIN, Adm'r."

This note is one of several, the others and the half of this having been paid. The defendant, by his answer, filed in April, 1871, claimed a set-off of moneys advanced by him in and prior to 1864, and of commissions on remittances by him of money of the estate to Mrs. Seybold, all prior to 1864, and in the lifetime of Mrs. Seybold, amounting, in the aggregate, to \$1,673.64, and demands a judgment for the balance after paying the note.

The plaintiff denies that the defendant acted as the agent of Mrs. Seybold in the collection of rents, or that she was the owner of any real estate in Cincinnati, and avers that the defendant, as statutory guardian of the estate of Elias F. and Emma O. Seybold, minor children of Emanuel and Catherine Seybold, collected certain rents and handled cer-

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tain moneys for said minors, for which he has been fully paid; and that if he had not been compensated for services rendered as guardian of the children, the probate court is the proper tribunal for making the proper allowance in the settlement of the guardian's account.

The plaintiff also says that the cause of action stated in the cross-petition did not accrue within six years.

The cause of action presented by the defendant arose in 1863, in the lifetime of Mrs. Seybold, who died in July, 1864. The statute of limitations, therefore, commenced running against the claim before her death. It is claimed, by counsel for the defendant, that the statute stopped running on the death of Mrs. Seybold, and did not commence running again until eighteen months after administration granted on her estate.

*Wm. Tilden and H. J. Harrop, for plaintiff.*

*Judge Coffin, for defendant.*

Taft, J. I can not find any authority for holding that the statute ceased to run on the death of Mrs. Seybold. I do not find any decision in Ohio which has overruled or impaired the authority of *Granger v. Granger*, 6 Ohio, 35, where it was held, both that the statute of limitations was available against a set-off, and that when the statute had commenced to run, the death of the debtor did not prevent its continuing to run. This is according to the approved construction of the laws for the limitation of actions in England and America, unless there be some express exception in the statute itself by which its running is to be interrupted after it has once commenced. The death of the debtor is not made an exception by our statute. In *Sherman v. Western, etc., Co.*, 24 Iowa, 515, it was held, that when the statute begins to run it will not stop unless the statute expressly provides that it shall stop.

It is also held, in *Patterson v. Hansel*, 4 Bush, 654, that if the statute has commenced to run in the lifetime of the

ancestor it will continue to run against the infant heirs. And in the very recent case of *Hull v. Delty*, 7 Bush (Ky.), 690, it is said, "It is the rule in this State, and so held by repeated adjudications of this court, that in regard to claims for personalty, when the statute of limitations begins to run in the lifetime of the claimant it is not interrupted by his subsequent death."

The rule is the same in regard to the debtor, as is stated in Angell on Limitations, p. 57, where it is laid down "that if the statute has once began to run in the lifetime of the testator or intestate, it does not cease running during the period which may elapse between his death and the time at which a personal representative is constituted and duly qualified." It was so expressly held at law, in England, in *Rhodes v. Smethurst*, 4 Mees & Welsb. 42; and in equity, in *Freake v. Cranefeldt*, 3 Mylne & Craig Ch. R. 455. The chancellor said in the latter case, "that it would be absurd to hold, that, if the debtor died only one day before the six years were out, the creditor was to have another period of six years within which to enforce his demand." *Nicks v. Martindale*, 1 Harper, 135, and *Beauchamp v. Mudd*, 2 Bibb, 537, are to the same effect.

The case of *Rhodes v. Smethurst*, 4 M. & W. 57, is a leading case in which the barons gave opinions *seriatim*, and the case was afterward affirmed in Exchequer Chamber, 6 M. & W. 351, where it was again fully considered and decided. *Johnson, Adm'r, v. Wren*, 3 Stewart, 173, 180; *Bunce v. Wolcott*, 2 Conn. 27; *Demarest v. Wynkoop*, 3 J. Ch. R. 129; *Jackson v. Wheat*, 18 J. R. 40; *Jackson v. Johnson*, 5 Cowen, 74, 93; 4 Taunt. 826.

I am satisfied that the claim which is pleaded as a set-off by the defendant, is barred by the limit of six years in the general statute of limitations. The fact that in 1867, when he made the last payment, the defendant informed the administrator that he had a claim against the estate, did not stop the running of the statute. The first legal step he took to enforce his claim was

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April 14, 1871, when he filed his answer. So that nearly eight years had elapsed since the action must have accrued on the claim he seeks to have set off; and more than six years had elapsed before the petition was filed by the plaintiff in this case, which was January 15, 1870.

It is asked, "Why may not the claim of Garretson be treated as a payment of the note, as of the date when the commissions accrued?" That question is answered in the present case, by the fact that the note was made after the commissions accrued, and if they were intended to be payment, should have been deducted. They could not be treated as payment on the note, as of the date when the commissions accrued, because the note had no existence.

But if this claim of the defendant were not barred by the general statute of limitations, and the facts had been pleaded, as proved, I think it would have been barred by the four years' limitation, in the act regulating executors and administrators, 1 S. & C., sec. 101, pp. 585, 586, which provides that "no executor or administrator, after having given notice of his appointment, as provided in the 81st section of this act, shall be held to answer to the suit of any creditor of the deceased, unless it be commenced within *four years* from the time of his giving bond, as aforesaid."

It appears from the evidence and the admission of the parties, that the four years' limitation would have expired and did expire in 1868, two years before the commencement of this suit, and nearly three years before this claim was set up by way of answer in this case, which is the only presentment of it ever made to the administrator.

But I place my decision upon the general six years' limitation, because the four years' limitation, under the administration act, has not been pleaded. I do not, however, intend to decide the question whether the four years' statute can be available to the plaintiff upon the evidence, without an averment in the replications setting up that

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statute. These statutes are regarded with more favor than formerly.

In the case of *Kelly v. Wiseman's Ex'rs*, 2 Dis. 418, it was held, upon the reasoning of the Supreme Court in *Hill v. Henry*, 17 Ohio, 11, that "the judge, before whom the case is tried, may take notice of the lapse of time, without plea, or after pleas should be filed."

But in *Sturges v. Burton*, 8 Ohio St. 219, it was decided that the objection of the statute of limitations is available on a demurrer to a petition, which shows upon its face that the claim is barred. But if the defendant neither demurs nor answers, setting up the statute, that defense is waived. The same doctrine is approved in 18 Ohio St. 67.

I place my opinion, therefore, on the general statute, and find for the plaintiff the amount of the \$500 and interest. But the interest must be cast at six per cent., although the note provides for eight per cent. The law, at its date, January, 1864, did not allow contracts for more than six per cent.

The eight per cent. act was passed in 1869, and the ten per cent. act was repealed in 1859. The judgment will include six per cent. simple interest.

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SAMUEL FOSDICK, Plaintiff in Error, v. WILLIAM GREEN,  
Defendant in Error.

G., owning shares of Marietta and Cincinnati Railroad stock in 1856, transferred the same to F., who gave receipts substantially as follows: "Borrowed of Wm. Green, 109 shares M. and C. stock, returnable on demand, with interest at the rate of eight per cent."

In 1860, a mortgage was foreclosed and the entire railroad property was sold at judicial sale, and a special act passed, ratifying the sale and affirming the title and franchise of the purchasers, who were trustees appointed by and acting for the creditors. The same year a reorganiza-

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tion was effected, and to it, as "The Marietta and Cincinnati Railroad as reorganized," the trustees conveyed by deed. Subsequently, under the act of April 4, 1863, another deed was executed from the "Marietta and Cincinnati Railroad Company" to the "Marietta and Cincinnati Railroad Company as reorganized," thereby vesting it with the franchise, property, and rights of the old corporation, at which time the stock of the Marietta and Cincinnati Railroad Company had no market value.

In suit by G., to recover from F. the value of the stock transferred:

*Held*, that the sale of the road and franchises, together with the subsequent proceedings, acted as a complete extinguishment, for all practical purposes, of the Marietta and Cincinnati Railroad stock.

That the stock having no existence when this suit was brought, no demand for its return and refusal was necessary, and the bringing of this action was a sufficient demand.

That the transactions between the parties were, in fact, sales, and the vendee was bound to compensation; and, the risk of the contracts being upon him, under the circumstances, that the measure of damages was the market value of the stock at the time of the loan, in 1856.

Writ of error to Special Term, to reverse a judgment there in favor of the plaintiff below.

William Green was the plaintiff below, and filed his petition on January 16, 1869, setting forth two causes of action, as follows:

*First.* The plaintiff alleged that he owned 109 shares, of \$50 each, of the capital stock of the Marietta and Cincinnati Railroad Company, a body corporate under the laws of Ohio, and that said shares bore interest at the rate of eight per cent. per annum, and said shares, with the interest accrued thereon, were worth, on January 1, 1856, the sum of \$8,084.50. That the said Green, on that date, at the special instance and request of the defendant, Samuel Fosdick, lent and fully transferred the said shares to the said defendant, who then and there promised and agreed to return said stock to the plaintiff, when requested, with interest, of which promise and agreement the following is a copy, viz:

"Borrowed of William Green, Esq., one hundred and nine shares (\$5,450) of the capital stock of the Marietta



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and Cincinnati Railroad Company, returnable on demand, with interest on said stock at the rate of eight per cent. per annum, from the 1st of February last.

(Signed,)

"SAM'L FOSDICK."

"June 1, 1856."

On which agreement was the following memorandum, written by defendant, viz:

"109 S.—\$5,450.00

111 S.— 5,550.00

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\$11,000.00

293.33, four months' int. at 8 per cent.

25.94, marginal interest.

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\$11,319.27, or \$6,225.60."

Plaintiff further averred, that the defendant had not returned said stock, and that in the year 1860 the said Marietta and Cincinnati Railroad Company transferred their said railroad, and all their property and means, to another and different company, and said corporation was surrendered and dissolved, and all the capital stock thereof became and was wholly extinguished, all of which was well known to the defendant; and that afterward, on [the — day of October, 1868, he duly requested the defendant to perform his said promise and agreement, and pay the plaintiff the value of his said stock and interest, as above stated, with interest; but the defendant wholly refused to do so, whereby the plaintiff has wholly lost the said stock and the value thereof.

The second cause of action was in the same form as the first, but was on a separate agreement, as follows, viz:

"Borrowed of William Green, Esq., certificates for one hundred and eleven shares of Marietta and Cincinnati Railway stock, drawing interest at eight per cent., from Febru-

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ary 1, 1856, marginal interest, \$25.94, to be returned on demand. (Signed,) SAM'L FOSDICK."

"January 12, 1857."

"111 Shares, . . . . . \$5,500.00

Int. from Feb. 1, 1857.

Marg. int., . . . . . 25.94."

The defendant answered as follows:

That on and from the 1st day of June, 1856, there had been issued by the said Marietta and Cincinnati Railroad Company a large amount of certificates of stock, signed by the treasurer and president of the company, certifying that a person or persons named therein were owners of a specified number of shares in the capital stock of said company, transferable on the books thereof in person or by attorney, on the surrender of the certificate; that on the back of each certificate was printed a blank form of a power of attorney, and also a statement, signed by the secretary of the company, that "the within certificate is entitled to eight per cent. interest per annum in stock." The defendant further states, that it was usual and customary for those who had obtained from said company the said certificate of stock to sign said power of attorney, leaving blank (to be inserted thereafter) the name or names of the person or persons to act as attorney, which usage and custom was well understood and recognized by said company. And the defendant further states, that such certificates of stock, with the power of attorney so executed in blank, were, on and prior to the 1st of June, 1856, and subsequent thereto, including the 12th of January, 1857, bought and sold in the city of Cincinnati as and for the stock of said company.

The defendant further says, that he denies that the plaintiff was the owner, and lent and transferred to the defendant shares of stock in said Marietta and Cincinnati Railroad Company, otherwise than as holding and loaning and transferring by delivery to the defendant certificates of stock, with a power of attorney executed in blank, as

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hereinbefore described. And the defendant states that the shares of stock mentioned in the two written agreements set out in the petition were such certificates of stock to the amount therein named, and the shares of stock to be returned to the plaintiff on demand were like certificates of stock to the same amount, and such additional amount as the interest, payable in stock, which might have accrued at the time of demand, would require. And the defendant states that the plaintiff has in no form or manner made demand upon him, the defendant, for the return of the shares of stock in said two written agreements mentioned, or of either of them.

The defendant, for further answer, denies the allegations in the said petition as to the surrender and dissolution of the said Marietta and Cincinnati Railroad Company, and the extinguishment of its capital stock.

The court found the plaintiff below entitled to a judgment for the market value (about sixteen cents on the dollar) of the stock mentioned in the two agreements at the time they bear date, with interest from that time at eight per cent., and rendered judgment for the sum of \$3,816.73.

A motion for a new trial was made by both parties and overruled, and this action is prosecuted to reverse that judgment.

*Stallo & Kittredge*, for plaintiff in error:

I. No breach of the contract set forth in the petition occurred, whereon an action could be maintained, until a demand was made of Fosdick for the return of the stock named in the contracts. It is the demand and refusal which constitutes the breach of the contract and does the damage. *Lobdell v. Hopkins*, 5 Cowen, 516; *Vance v. Bloomer*, 20 Wend. 196; *Moore v. Hudson River R. R. Co.*, 12 Barb. 156; *Norman v. Isley*, 17 Wis. 814, and same case 21 Wis. 138; *Thrall v. Meade's Estate*, 40 Vt. 544; *Newman v. McGregor*, 5 Ohio, 349.

II. The measure of damages for a breach of the contract set forth in the petition is the value of the stock at the

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time of the breach of the contracts, which, from the preceding proposition, was the time of such demand and refusal. *Chase v. Washburn*, 1 Ohio St. 244; *C. & P. R. R. Co. v. Kelly et al.*, 5 Ohio St. 180; *Robinson v. Noble*, 8 Peters, 181; *Eastern Railroad Co. v. Benedict*, 10 Gray, 212; *Smith v. Berry*, 6 Shepley, 122; *Bush et al. v. Canfield*, 2 Conn. 485; *Wells v. Abernathy*, 5 Conn. 222.

III. 1. The deed from Noah Wilson and others, purchasers at the receiver's sale, to the Marietta and Cincinnati Railroad Company as reorganized, is invalid for want of a competent grantee. *Sloan v. McConaly*, 4 Ohio, 157; *Jackson v. Corry*, 8 Johns. 386; *Jackson v. Hartwell*, 8 Johns. 422; *Hornbeck v. Westbrook*, 9 Johns. 78.

2. From the last proposition, the deed of the Marietta and Cincinnati Railroad Company to the "Marietta and Cincinnati Railroad Company as reorganized," is invalid, because the grantees do not fall within the persons defined in the act of 1863. S. & S. 131.

3. The deed purporting to have been made under this act is void, because the consent of two-thirds of the stockholders thereto is not shown.

4. The deed is void, as there is no proof that the condition of the proviso of said act was ever complied with. If it was not, the deed is void; if it was, the preservation of the old stock, as a thing of value, has been specially provided for, and it may be converted, under the proviso, into stock in the new corporation.

5. The act of 1863 is unconstitutional, because it is a special act conferring corporate powers, under sections 1 and 2 of the constitution of Ohio.

IV. In no case can the *damages* bear eight per cent. interest.

*King, Thompson & Avery, and Nicholas Longworth*, for defendant in error:

I. This loan was a *mutuum*, and in legal effect a sale, changing the property, throwing upon the borrower all the

risks attending its return and creating a debt. *Chase v. Washburn*, 1 Ohio St. 249. Demand of the stock was not necessary to the action. Demand of its value, as alleged in the petition, was sufficient.

II. The value at the time of the demand, or suit brought, is not the measure of damages in such a case. The rule is not general. It does not apply to stock contracts. *Bates v. Wiles*, 1 Hamdy, 532; and see 26 N. Y. 809; 31 N. Y. 676; 26 Penn. St. 143; 19 Conn. 212; 23 Ind. 1. Nor to real estate contracts. *Buck v. Waddle*, 1 Ohio, 357; and see 34 Penn. St. 418, and 35 Penn. St. 23, which are both directly against the decision in 5 Conn. 222, cited by plaintiff in error. Nor to contracts for merchandise when the price has been paid in advance. 3 Cowen, 82; 27 Barb. 424; 12 Cal. 171; 17 Cal. 415; 4 Texas, 289; 13 Texas, 324. Nor is it true that in an action upon a contract the original consideration can not be recovered. 15 Ohio, 123; 3 Jones' (N. C.) Law, 550; 2 Man., G. & S. 905.

III. But the rule claimed can not apply here, because at the time of demand no such stock was in existence. That is the peculiar and controlling feature of the case. That the stock of the Marietta and Cincinnati Railroad had become extinct is proved by the foreclosure and sale of their road and all its appurtenances, in 1860, to the new "Marietta and Cincinnati Railroad Company as reorganized," followed by the deed conveying its franchise and all its corporate rights and privileges to the new company, by virtue of the general act of April 4, 1863. S. & S. 131. The corporate capacity of the new company can not be collaterally impeached or questioned. *Webb v. Moler*, 8 Ohio, 548; 5 Ala. 787. The record of the suit of Noah L. Wilson, trustee, against the stockholders and creditors of the original company also proves that nearly all the old stock was surrendered in exchange for stock in the new company. The effect of all this was, the old company and its stock were defunct prior to 1868. Its charter was virtually surrendered.

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IV. The risk of returning the stock being on the plaintiff in error, and the stock destroyed, the only possible measure of damages was its value at the time of the loan. The court had no other alternative. No intermediate time between the loan in 1857 and the demand in 1868 could be selected. The court was, therefore, unavoidably remitted to the value of the stock at the time of the loan. The plaintiff in error, as vendee, is bound for compensation. He owes the plaintiff, and the stock has been lost without any fault of the latter.

V. The value at the time of the loan being the measure of damages, and the parties, by their memorandum made at the time on the loan note, having put their own valuation upon the stock, that should govern. Why else was it put there? *Taft v. Wildman*, 15 Ohio, 128; *Barret v. Allen*, 10 Ohio, 426; *Story's Bailment*, secs. 253, 253a. And see 2 Man., Gr. & S. 905; 3 N. H. 299; 12 Pick. 562; 10 Met. 481.

HAGANS, J. This action is founded on two agreements, one of which is as follows:

"Borrowed of Wm. Green, Esq., one hundred and nine shares (\$5,450) of the capital stock of the Marietta and Cincinnati Railroad Company, returnable on demand, with interest on said stock at the rate of eight per cent. per annum from the 1st of February last.

"June 1, 1856.

SAMUEL FOSDICK."

On which there is a memorandum, viz:

"109 S.—\$5,450

111 S.— 5,550

—————  
\$11,000

293.83—4 mos. int. at 8 per cent.

25.94—marginal int.

—————  
\$11,319.27—or \$6,225.60."

The other agreement is as follows:

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"Borrowed of Wm. Green, Esq., certificate for one hundred and eleven shares of Marietta and Cincinnati Railway stock, bearing interest at eight per cent. from February 1, 1856; marginal interest, \$25.94; to be returned on demand.

SAMUEL FOSDICK.

"January 12, 1857."

On which there is this memorandum:

"111 Shares, . . . . .	\$5,550
Int. from February 1, 1856.	
Marg'n'l int., . . . . .	25.94."

And judgment was asked for \$6,225.60, interest and costs.

On the trial it appeared that the agreements sued on were in the handwriting of the defendant, including the memoranda in figures, which were placed thereon, before the papers were delivered to the plaintiff. It seems that the parties had a large negotiation or "swap," as they call it, shortly before, amounting to over \$32,000, in which the defendant transferred to the plaintiff certain stocks, including those mentioned in the agreements, in exchange for certain notes indorsed by the plaintiff to the defendant. It was claimed that the memoranda in figures at the bottom of the contracts, were intended to indicate the agreed value of the stock at the time the loans were made. Mr. Green states that this value "was ascertained and declared on an account," containing the statement of the securities involved in the "swap," which "exactly corresponds with the memoranda" in the agreements. Mr. Fosdick states that these figures simply represented the price at which these stocks were put in that bargain—"that these figures did not represent the market value of the stock, but to show their nominal or conventual value at which he and the plaintiff had swapped the stocks and notes. The stock named in the contracts was transferred to the defendant, who afterward had sole control of it, and was never returned or offered to be returned, or paid or settled for.

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There is testimony of an alleged demand by the plaintiff for the return of this stock in October, 1868. It seems that about that date the plaintiff was indebted to the defendant on the indorsements spoken of, which he afterward paid off; to an amount greater than the value of the stock, as agreed on the "swap." And Green says, as Fosdick did not press him on these indorsements, he did not press Fosdick for a return of the stock, because it would have "seemed ungenerous, if not absurd," and "greatly to my disadvantage and inconvenient" to have met the liability to the defendant. In June, 1856, the stock of the Marietta and Cincinnati Railroad Company was worth 16½ cents, and in January, 1857, 15½ cents.

It further appeared, that in June, 1860, the Court of Common Pleas of Ross county, Ohio, ordered a sale of the property and rights of the Marietta and Cincinnati Railroad Company, being insolvent, under proceedings in foreclosure of the mortgage indebtedness thereon, and afterward a majority of the bondholders and creditors and the directors of the company agreed, that after such sale the purchaser should hold the property subject to a reorganization upon a basis agreed upon; that afterward, in 1860, the legislature of Ohio passed "an act for the relief of the creditors and stockholders of the Marietta and Cincinnati Railroad Company," the purpose of which was to vest in the purchaser at such sale all the franchises, the charter and property of the corporation, and to authorize the reorganization of the company. That act provided for the issue of a preferred stock to carry out the terms of the said agreement, and for the completion of the enterprise and its connections.

Accordingly, in 1860, the franchises, property, and rights of the corporation were sold to certain persons as trustees in behalf of the mortgagees and creditors, which sale was confirmed and a conveyance made in pursuance thereof to the purchasers. In the same year, the company was afterward reorganized by the parties in interest, under the said



act of the legislature, under the style of "The Marietta and Cincinnati Railroad Company as reorganized," and the said trustees conveyed to the new corporation the property they had bought. The new corporation provided for the issue of three classes of stocks, having preferences of dividends in the order named, according to the agreement:

First preferred stock, entitled to dividends of six per cent.; second preferred stock, entitled to dividends of six per cent.; common stock, entitled to dividends of six per cent.

The court, in the decree named, and in pursuance of said agreement, set aside to N. L. Wilson, as trustee, \$1,500,000 of common stock, to be distributed *pro rata* among all the stockholders and unsecured creditors of the old company—the proportion to stockholders being twenty per cent. of the stock held by them.

The trustees, being unable to distribute this stock from various causes, filed a bill to compel the parties to come in and receive it, and invoke the aid and protection of the court in the premises, and in June, 1865, the court entered a decree barring any future claim on the part of a creditor who had not filed his claim. The stock in question in this case was not presented to the trustee in that case by the defendant.

The legislature of Ohio, on the 4th April, 1863, passed "an act supplementary to an act entitled "an act to provide for the creation and regulation of incorporated companies in the State of Ohio, "passed May 1, 1852," and in February, 1865, before the entry of the last-named decree, the Marietta and Cincinnati Railroad Company, in pursuance of an order of its board of directors, conveyed by deed to the Marietta and Cincinnati Railroad Company, *as reorganized*, its franchise to be a corporation. At that time, the stock of the Marietta and Cincinnati Railroad Company had no market value—in fact, could not be sold at all. The same is true as of the time of the entry

of the decree in June, 1865, though some of the old stock was then and still is outstanding.

It has already been determined by this court, in General Term, on demurrer to the petition, that the transactions between these parties have all the legal characteristics and results of a sale of the stock in question. This opinion was based on the fact that the title to this stock passed to the defendant, as in a *mutuum*; that the identical stock borrowed was not intended or expected to be returned, but other stock of like kind and amount on demand; and the court cited *Chase v. Washburn*, 1 Ohio St. 244, as conclusive; Story on Bail, sec. 47; *Mallory v. Willis*, 4 Comst. 76. It was, in fact, a purchase by defendant, to be paid for at a future time, according to the contract, in stock of a like kind and amount, on demand, or what was equivalent to a demand. The principal, and indeed the only question that remains to be considered, is whether the judge at Special Term erred in finding that the market value of the stocks at the date of the transactions, respectively, was the true measure of the plaintiff's damages, with interest at eight per cent.; and here the plaintiff takes exception to the judgment of the court below, claiming that the parties had agreed to the value of the thing loaned according to the memoranda, and it was therefore a *valued loan*; and that according to *Taft v. Wildman*, 15 Ohio, 123, which was a case of "swapping," the parties in the agreement had fixed "their own terms, conditions, and prices," and that amount, viz: \$6,225.60, "is the true rule of damages." Story on Bailments, secs. 253, 253a.

But, aside from the fact that the plaintiff in the pleadings seeks to recover its value, we think the testimony very clearly shows that these memoranda refer to the prices of this stock, which had been agreed upon in the *previous* transactions between them, and had no reference to an agreed valuation of the loans themselves at the time they were made. The loan transactions were wholly disconnected with the prior "swap," and these memoranda are not evidence from

which we can fix the measure of damages. The case at bar differs wholly, therefore, from those in the authorities cited. See *Keys v. Harwood*, 2 M. G. & S. 905; *Drown v. Smith*, 3 N. H. 299; *Wakefield v. Steedman*, 12 Pick. 562; *Jones v. Richardson*, 10 Met. 481.

The defendant excepts to the judgment of the court below on various grounds. It is claimed, that here was a sale, to be paid for, not in money, but in a specific article of like kind and amount, irrespective of market value, when demanded; that a demand must be alleged and proved; that the true measure of damages is the value of the article when demanded and refused; and that in no case could the measure of the damages be the value of the stock at the time of making the contracts, with eight per cent. interest. Other objections were made, but these embody them all in our view of the case; and a very large number of authorities were cited to support them. *Lobdell v. Hopkins*, 5 Cowen, 516; *Vance v. Bloomer*, 20 Wend. 196; *Moore v. Hudson River Railroad Co.*, 12 Barb. 156; *Newman v. McGregor*, 5 Ohio, 349; *C. & P. R. R. Co. v. Kelley, etc.*, 5 Ohio St. 180; *Chase v. Washburn*, 1 Ohio St. 244; *Russell v. Ormsby*, 10 Vt. 274; *Thrall v. Meade's Estate*, 40 Vt. 544; *Frazer v. McCord*, 1 Carter (Ind.), 224; *Ewing v. French*, 1 Blackf. 170; *Martin v. Churms*, 7 Miss. 277; *Hotchkiss v. Newton*, 10 Geo. 560; *Wyatt v. Bailey*, 1 Morris (Iowa), 396; *Norman v. Isley*, 17 Wis. 314; *same case*, 21 Wis. 138; *Robinson v. Noble*, 8 Pet. 181; *Eastern Railroad Co. v. Benedict*, 10 Gray, 212; *Smith v. Berry*, 6 Shepley (Me.), 122.

It was held by the court, in the demurrer to the petition, that no special demand was necessary, and that, so far as the remedy of the plaintiff was concerned, the transactions must be treated as money contracts. *Newman v. McGregor*, 5 Ohio, 352; *Trowbridge v. Holcomb, etc.*, 4 Ohio St. 44; *Ward v. Howard*, 12 Ohio St. 158. Again, the mere lapse of time, and the conduct of the defendant, in exercising continued and unequivocal dominion and control over the property, were, of themselves, a substantial conversion of

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the thing loaned, and so other special demand need not be alleged or proved. *Bristol v. Burt*, 7 Johns. 254. At all events, the bringing of the suit was a sufficient demand. Again, it was claimed by the plaintiff, that long before the bringing of the suit the stock was not only worthless, but had, in fact and in law, *no existence*, because the Marietta and Cincinnati Railroad Company had parted with all its franchises, property, and rights of every description to the Marietta and Cincinnati Railroad Company *as reorganized*, and a demand need not therefore be made, as the law would not require a vain thing to be done; and that these considerations took this case out of the ordinary rule of the measure of damages as stated in the authorities.

The real questions involved in this view of the case, is stated thus: Do the facts avoid the necessity of a demand? If so, are they proved; and if they are, what is the measure of damages? We have already, in great part, answered these questions.

Although our Supreme Court, in *Atkinson v. Marietta and Cincinnati Railroad Co.*, 15 Ohio St. 23, in December, 1864, decided that the proceedings in the Ross county court of common pleas did not vest the new corporation with the corporate franchises of the old company, yet by the proceedings under the act of April 4, 1864 (S. & S. 131), which are unreversed, and by the deed of February, 1865, we think, without calling attention to the specific objections made, for all practical purposes, nothing tangible whatever remains of the old corporation or of the property which had belonged to it. At all events, the new company is a *de facto* corporation, recognized by this court constantly, in suits pending and tried, and perhaps by all the courts in the State; and its proceedings are valid until ousted by a proper suit and judgment. *Webb v. Moler*, 8 Ohio, 548.

Besides, we do not see how the defendant can, in a collateral proceeding like this, question the fact of its existence and the conclusion of the facts connected with its origin. It is said, however, that Green, equally with Fosdick, assumed the risk of the contingency which happened. But

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it must be remembered that the maxim, "*Ejus est periculum, cujus est dominium*," applies in this case. The whole risk of loss, under the facts of this case, fell upon Fosdick. It is true that Green would have been entitled to any appreciation in the value of the stock, or subjected to any loss by depreciation; and Fosdick, on the other hand, would have been subjected to loss by appreciation of value, and entitled to the profit of a depreciation. But this goes upon the idea that the thing itself had an existence at the time a demand was made; and, in such a case, the authorities cited would be entitled to their proper force. But here was not only a depreciation of the thing loaned, until it was worthless, but a practical destruction of it; and the borrower was thus disabled, by his own delay, to restore the loan. It was impossible for him to satisfy the contract, as there was no such thing in existence as this stock, as we think is, for all practical purposes, shown by the evidence. *This is the peculiar and controlling fact in this case*, and distinguishes it from all other cases found in the books. Indeed, there is no reported case, which either counsel or the court have been able to find, which resembles this in this respect.

Now, it is said, that inasmuch as the thing loaned was worth nothing in October, 1868, when an alleged demand was made, or when the suit was brought, that the plaintiff can recover nothing. This is, undoubtedly, the ordinary rule, but there are exceptions to it. It does not apply to that class of contracts in which the plaintiff has a right to recover, not the market value at the time of demand, but the highest market value between the sale and the commencement of the action or the time of trial. *Bates v. Wiles*, 1 Handy, 532; *Romaine v. Van Allen, etc.*, 26 N. Y. 309; *Scott v. Rogers, etc.*, 31 N. Y. 676; *Bank of Montgomery v. Reese*, 26 Pa. St. 143; *West, etc. v. Pritchard, etc.*, 19 Conn. 212; *Kent, etc. v. Ginter*, 23 Ind. 1. Another exception is found in the case of contracts relating to real estate. *Buck v. Waddle*, 1 Ohio, 357; *Hertzog's Adm'r v. Hertzog*, 84 Pa. St. 418; *McNair v. Compton*, 35 Pa. St. 23. And still another, where

payment of the price of merchandise is made in advance. 8 Cowen, 82; 27 Barb. 424; 12 Cal. 171; 4 Texas, 289. And see *Sargeant v. Covington and Cincinnati Bridge Co.*, 1 S. C. R. 354; *Henson v. Chastine*, 3 Jones (N. C.), 550. In *Keys v. Harwood*, 2 M. G. & S. 905, where the defendant, by his own act, made it impossible to deliver goods under a contract to pay with them for the services of the plaintiff, Ch. J. Tindal held that an action might be maintained for the value of the services. And in *Taft v. Wildman*, 15 Ohio, 123, our Supreme Court held that the plaintiff could recover the original price at which the land certificates were taken in the trade in that case. And we think the case at bar should be classed among the exceptions as to the measure of damages.

It has not escaped the attention of the court that Fosdick has not offered to return the identical, nor indeed any stock, nor explained his use of the stock borrowed. He was not bound to do either. We are to regard him as a *vendee*, and as bound to make compensation. The contract is absolute. It would be a hardship to allow him to purchase a thing of real value and to pay for it in a thing which has no existence, so to speak, or rather to pay nothing. Now, that he can not restore the stock, by his own delay, neither law nor equity will help him to substantially ignore the contract and shift the loss on the plaintiff. There is necessarily, therefore, no other mode or measure of compensation to the plaintiff but to restore to him its value at the time the loan was made. There is no intermediate time between the date of the loan and the bringing of the suit at which we can stop to ascertain the damages.

Having thus affirmed the principle upon which the judgment at Special Term proceeds, there remains the question of the interest allowed. We think the judge erred in allowing eight per cent. It should have been but six per cent. from the date of the transactions respectively, and the judgment will be modified accordingly.

**J. C. BAUM ET AL., the City Board of Equalization, v. THE  
BOARD OF COMMISSIONERS OF HAMILTON COUNTY.**

The city board of equalization are entitled to compensation for their services from the county treasury, and county commissioners are obligated to fix and allow the same without reference to the rate of the compensation allowed the county board of equalization.

This was an amicable suit reserved on an agreed statement of fact to General Term.

The case appears fully in the opinion.

*W. S. Scarborough, County Solicitor, for the defendants.*

STORER, J. The question submitted to us is, whether the commissioners of Hamilton county have the power to fix the per diem compensation of the city board of equalization for their services, and pay the same out of the county treasury.

By section 40 of the act of April 5, 1859 (S. & C. 1454), it is enacted "that there shall be a special board for the equalization of the real property in the city of Cincinnati, to be composed of six citizens of the city, to be appointed by the city council, who, with the county auditor, shall compose the city board of equalization. Such board shall meet on the fourth Monday of October, 1859, and every sixth year thereafter, and shall have power to equalize the value of the said property within the city, and shall be governed by the same rules, provisions, and limitations that are prescribed in section 39 of this act."

By the law of May 8, 1868 (S. & S. 753), section 40 was so amended that it was made to apply to all cities of the first and second class, thereby relieving it from any doubt as to its invalidity on the ground of special legislation merely. In no other particulars was the section changed.

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Baum et al. v. Board of Commissioners of Hamilton Co.

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A county board of equalization was also constituted by the act of 1859, composed of the county auditor, the county surveyor, and the county commissioners, or a majority of them, who were to perform the same duties in relation to the real estate without the city, as the city board of equalization were empowered to discharge in the equalization of real property within the city limits.

By section 50 of the same act (S. & C. 1458), it was enacted that "each member of the county board of equalization shall be entitled to receive for each day necessarily employed in the duties enjoined upon him by this act, such sum as the commissioners of the county shall allow, not exceeding two dollars, to be paid out of the county treasury on the order of the auditor," but no reference is made to the city board, and no provision in terms is made to remunerate its members, nor does it appear to us, although the city board are bound to perform the same duties and to be governed by the same rules the law imposes upon the county board, they are thereby limited to the same per diem allowance by necessary implication.

The county board is composed of county officers only, who receive their annual salary meanwhile, and for the additional duties devolved upon them they may claim the extra allowance given by section 50. But the city board, with the exception of the county auditor, are not officers of the county, but private citizens, who are called from their ordinary business, which may require immediate attention, and to give their whole time for months to the discharge of a most important yet irksome duty. It is but just, therefore, that they should be fairly, and performing as they do so important a service, liberally compensated. Nor do we think the allowance to be made in any manner depends upon what may be the compensation of the county board, as from the difference of the composition of the two boards, neither the nature of their office nor the equity of the statute demand such a comparison as the measure of remuneration.

Nor do we believe that the county commissioners should



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remand the city board to the city council for their compensation. The commissioners have heretofore admitted, we are told, their power to compensate the city board, and we can see no injustice nor any excess of jurisdiction on their part to prevent them from still exercising it. The city pays a very large share of the taxes assessed for county purposes, and of necessity is compelled mainly to bear the burden of discharging the compensation allowed to the county board, though they have no control over the assessment of the real property within its limits, and it is but the same result if the allowance to be made to the city board is paid in the first instance from the county treasury, as practically the city bears its full proportion of the expense.

We are of the opinion, therefore, that the commissioners have the necessary authority, and would be fully justified in allowing the members of the city board a fair and liberal compensation for their services, in performing the duties they have assumed, to be paid from the county treasury.

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HILTZ v. SCULLY. (IN GENERAL TERM.)

B. contracted with H. to build him a house, and employed S. to do the plastering. When the work was ready for the plastering, B. had become of doubtful credit, and S. applied to H. to know whether he had funds of B. under the contract to pay for the plastering, and was assured by H. that there would be funds of B. retained in H.'s hands to pay for the work to be done by S., and also gave his verbal promise that if S. would go on and do the work, he, H., would pay for it if B. did not. S. thereupon went on and did the plastering, but when he called on H. for the money, H. denied that he had any money of B. under the contract.

*Held*, that H. was estopped to deny that he had funds to pay for the work; also, that the promise was an original contract with S., not void under the statute of frauds, as a verbal promise to pay the debt of another; that though the promise was first alleged in the reply, and might properly have been ordered to be stricken out of the reply as a departure,

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yet, as leave would have been given to put it in the petition by amendment, if stricken out of the reply, the error in overruling the motion to strike out was not prejudicial to the defendant, and so was not a ground for reversing the judgment rendered after a trial on the issue as made in the reply.

This was, in the court below, a proceeding by Scully, the plaintiff, for plastering done by him on the defendant's house, under a sub-contract with Becket & Megrue, who were the contractors with Hiltz for the building of the house. Becket & Megrue failed to pay the plaintiff, their sub-contractor, for the plastering done by him, and he served a notice upon Hiltz, the owner, under the statute to subject the funds in his hands coming to the contractors. The defendant claims that he had paid to the contractors all that was due before the service of the notice. The plaintiff alleges, and claims to have proved, that before the work was done, the plaintiff, finding the doubtful circumstances of the principal contractors, signified to the defendant that he would not proceed with the work unless there were funds in his hands to secure him, the plaintiff, the payment of his compensation for the work; and that the defendant then, in order to induce the plaintiff to proceed with the work, assured him that there were sufficient funds in his hands to pay him for the work, and that it should be paid if he would only proceed, and that on that assurance he did proceed and performed the work, and gave the notice under the statute. Now, it is claimed that the defendant can not be heard to contradict the statement he made before and at the time the work was done; and secondly, that the defendant did actually contract with the plaintiff to pay him for the work, and that on that contract, and on that only, the work was done by the plaintiff, who had no confidence in the solvency of Becket & Megrue.

*J. C. Miller*, for defendant in error.

TAFT, J. We have examined the evidence in the case, and are satisfied that the allegations of the plaintiff are

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substantially sustained by it, and that it would be inequitable for the court to allow the defendant, after having secured the benefit of the work in the manner proved, to turn the plaintiff over to Becket & Megrue for his compensation. The defendant was directly interested in having the work go on. Becket & Megrue could not pay for it. The plaintiff was under no obligations to do the work for the defendant without being paid for it. The consideration for the assurance given by the defendant to the plaintiff was direct and sufficient.

But it is claimed that this ground of recovery arises upon the replication only, and is such a departure from the case made in the petition as to preclude the plaintiff from availing himself of it; that Scully, who was the sub-contractor, in his petition showed that Hiltz, the defendant, who was proprietor, assured the plaintiff before the work was done that he, defendant, had in his hands funds belonging to Becket & Megrue, the contractors, sufficient to pay the plaintiff for the work he was doing as a sub-contractor, and that the defendant Hiltz was estopped to deny the truth of the assurance on the faith of which plaintiff did the work; that the defendant, having in his answer denied the existence of funds in his hands belonging to the contractors, the plaintiff in reply alleged that Hiltz not only assured the plaintiff that there was and would be funds of the contractors, Becket & Megrue, in his hands to pay for the work, but promised the plaintiff that if he would proceed and finish the work, the defendant would pay him for the work if the contractors did not. It is claimed by the defendant that the allegations in the replication of a promise to pay for the work was a departure, and that the court erred in overruling the demurrer to the reply, and in overruling the motion to strike out this part of the reply. We do not regard the allegation in the replication inconsistent with the petition. Although the contractors, Becket & Megrue, were responsible for the work, yet, under the circumstances, we think that the defendant Hiltz must also be considered

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as responsible as upon an original contract to plaintiff. It was not a promise merely collateral to the engagement of Becket & Megrue; for here was a work to be done for defendant, and the plaintiff was not bound to do it unless he could be paid for it. Becket & Megrue were no longer able to pay for it. It became the defendant's own affair, just as much as if Becket & Megrue had never had a contract on the subject. That alleged promise, that he would pay, was not inconsistent with the assurance that he should have in his hands funds of the contractors sufficient to pay for the work. Nor was it necessary that that promise should be in writing, as coming within the statute of frauds, for as between plaintiff and defendant it was the defendant's own debt.

Could, then, the promise be brought forward in the reply after the answer had set up as a defense that defendant had no money of the contractors to pay plaintiff.

The promise set up in the reply ought to have been alleged in the petition, and might properly have been stricken out on motion. But it would have been stricken out only to be incorporated in the petition by amendment. The evidence has been heard, and in the opinion of the judge who heard it, sustains the allegation of the promise.

If there was technical error in overruling the motion to strike out, we do not regard it as prejudicial to the defendant, or as now furnishing a ground to reverse the judgment.

Such a departure does not render the reply insufficient on demurrer. It is only by motion that the defendant can take advantage of it, and then it is in the nature of a dilatory objection. *White v. Joy*, 8 Kern. 83; Voorhes Code, sec. 155, p. 305.

The judgment of the court in Special Term is affirmed.

Application was made to the Supreme Court for leave to file a petition in error, which was refused.

**AMES v. AMES. (IN SPECIAL TERM.)**

A., in his lifetime, conveyed all his real estate equally to his two children, F. and O., his wife not joining. After his death, F. and O. each made deeds of their respective shares of the real estate to the widow, their mother, who for many years collected the rents, and claimed and enjoyed the property as her own.

Recently, F. brought a suit against the widow to set aside his deed and to recover his half of the property, and succeeded by a verdict of a jury finding that his deeds had never been delivered so as to give them effect. He also sought an account of one-half of the rents and profits while the widow had received them, which was ordered, but before the court had acted upon the report of the master, the widow died.

*Held*, that although the widow, claiming the fee, had not applied for dower as widow, she was not to be deprived of her share in the rents and profits, and while she was bound to account for the rents and profits, she was entitled to be credited in the account as widow with one-third of the net profits, on the principle that in seeking equity, the plaintiff must do equity.

That lands purchased by the widow and paid for, partly by the proceeds of other lands of the estate which she had sold, and partly by the rents and profits of the estate, were to be divided as lands of the estate so far as they were paid for by the proceeds of sales of lands of the estate, and to be distributed as personalty so far as they were paid for by the rents and profits.

Dan Ames, in his lifetime, conveyed to his two children, F. W. Ames and Olivia Hawes, all his real estate, his wife not joining in the deed. After the death of Dan Ames, both F. W. Ames and Olivia made deeds of their respective interests in the real estate to their mother, Mrs. Anne Ames, the widow, and the estate was managed for several years by them in the name of Anne Ames. But the deed of F. W. Ames, though put upon record by Mrs. Ames, has been found by a jury not to have been actually delivered so as to give it effect.

The old lady, being in possession under the evident belief that she was the legal owner, made no application for dower. Most of the rents were collected in her name, if not by her

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in person. The real estate has been partitioned between plaintiff and Olivia Hawes, now Kater. The cause was referred to a master to state an account showing what moneys Mrs. Anne Ames or Mrs. Hawes had received from or on account of the estate between January 1, 1859, and June 1, 1870, the date of the report; and what amount she had disbursed on account of the estate; also, what had been received from the estate in the same time by the plaintiff, F. W. Ames, and disbursed. In stating this account, the master has placed all that was received by Anne Ames and Olivia on one side, and what was received by F. W. Ames, the plaintiff, on the other.

He makes the gross receipts by the defendants, Anne Ames and Olivia Hawes, \$80,001.82, and their disbursements for the estate \$35,731.65, leaving a net sum to be accounted for by them of \$44,270.17.

He finds that the plaintiff had in the same time received \$14,639.05, and had disbursed for the estate \$2,293.23, leaving a net sum to be accounted for by him of \$12,345.82.

Deducting this \$12,345.82 received by the plaintiff from the sum of \$44,270.17, received by the defendant, he finds a balance of \$31,924.35, which he divided by two, and reports \$15,962.17 as the balance due from the defendants to the plaintiff.

TAFT, J. It is claimed by the defendants that the master has erred in sundry large and in some small items, in which the report should be corrected, if it is not set entirely aside for general uncertainty and insufficiency. It is true that the fact that no books were kept by any of the parties, renders an account taken so long after the transactions themselves, and of which there was no record, unsatisfactory. The court, however, by making the order of reference, recognized its duty to make the attempt to have an account stated; and the master, by the testimony of the plaintiff and Olivia, together with the receipts for rents, as shown by the tenants, and the receipts kept by Mrs. Ames for moneys paid

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out on account of the estate, or to the plaintiff, has been able to make a statement, which, if not complete, is probably true as far as it goes, and more satisfactory than was to have been expected. By using this statement, and the evidence, the court can make a more equitable decree than it could hope to make without it.

As to the item of presents made by the mother to the plaintiff, I do not find occasion to interfere with the conclusions of the master; nor do I find reason to change the finding of the master as to the 5-20 United States bond. The parties contradict each other as to the number of the bonds. The finding of the master is founded on as good reason as I could assign for any change I should make.

As to the rent of the Fourth street property, charged against the defendants at the rate of \$1,500 per annum while they occupied it, after the plaintiff and defendants separated, it seems to be a full rent. The house has been since rented at a higher rate, and I can not say, from the testimony, that it is too much, and do not see my way to disturb the finding of the master on that point. I have a recollection that rents were low about that time. But I have no evidence to justify a change.

Another objection was raised, in argument, to the report, that the master refused to credit Anne Ames with about \$7,164, amount applied by her to the payment of the mortgage on the Sharonville farm. I am satisfied from the evidence that the notes paid were the notes of Mrs. Kater, formerly Mrs. McMillan, which had been given by her for the balance of purchase money of the farm, her father having in his lifetime paid \$2,500 on the purchase. On the other hand, the counsel for the plaintiff claim that not only is Mrs. Ames not to be credited with that money so paid on Mrs. Kater's purchase, but that Mrs. Kater is to be charged with the money so advanced on her account, because it was advanced before January 1, 1859, and not charged to Mrs. Ames. But the court, in ordering the statement of the account, limited the inquiry to the receipts and dis-

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bursements subsequent to January 1, 1859, up to which time they had all lived together as one family, keeping no accounts of receipts and expenditures. Besides, it does appear from the statement of the plaintiff, who alone testifies on the subject, and from the papers themselves, that a principal part of the money was paid after January 1, 1859, and probably with money for which Mrs. Ames was charged in the account as stated. I conclude, therefore, that this part of the report of the master should stand.

As to the three pieces of property purchased by Mrs. Ames, and paid for partly by the proceeds of sales of land of the estate, and partly by the rents and profits, they are to be regarded in the division as real estate so far as they were purchased by the proceeds of the real estate sold, and so far as they were paid for by moneys arising from the rents and profits they are to be regarded as part of the rents and profits.

The master's report shows what part of the consideration was paid by proceeds of the sales of real estate, and what by the rents and profits.

In making this statement, the master makes no allowance to Mrs. Anne Ames on account of dower, or on account of the circumstances under which she forebore to apply for dower. This he was, perhaps, not authorized to do by the reference; and the question now comes properly before the court, whether any such allowance shall be made.

The effect of requiring Mrs. Ames to account for all the receipts necessarily makes her insolvent, unless she had separate estate independent of her husband, except so far as she may have had property or income from Olivia's half of the estate. Nothing would be left for her own support, unless she should be allowed a widow's share of the income.

Complaint is made by the defendants that the debits of the widow, Anne Ames, and Olivia have been confounded by the master, who has not distinguished what each of the



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defendants have received from, or on account of the estate. It would have been more satisfactory to have had a distinct statement of the moneys received by each. But the evidence may not be such as to render that possible, and it is hardly probable that such evidence can be obtained.

In the view I take of the case, however, the finding of the master is sufficiently specific to enable the court to render a decree on this point. I think that upon the pleadings and evidence in this case, as it stood when Mrs. Ames died, she was entitled in equity to an allowance out of those receipts equivalent to dower, that is, to one-third of the net income of the real estate for the time covered by the report. This was upon the principle that the plaintiff, in seeking equity from her, must do equity. A court of equity could not consent to charge her for all her receipts, under the circumstances I have stated, and at the same time allow her nothing, as the widow of Dan Ames.

The question is not without difficulty. In Ohio, dower commences with its assignment, and prior to the act of 1863, S. & S. 811, a suit in chancery for dower abated by the death of the widow, so that all right of dower was lost. *Miller v. Woodman*, 14 Ohio, 520.

By the act of 1863, it was provided that such a suit should not abate, but might be prosecuted in the name of her representatives. Nevertheless, in this State the widow's recovery upon a petition for dower reaches only the income since the filing of the petition.

But a widow is not shut out from the benefit of the same equitable considerations as other parties in a court of equity. The fact that Mrs. Ames, claiming the fee simple, did not by answer ask for dower, would not prevent a court of equity from protecting her interest as widow in the distribution of assets, as was held in *McDonald v. Aten*, 1 Ohio St. 296.

I am satisfied that if this case were in England, the court would not allow the heirs to hold the widow to account for

all the income of the estate, under the circumstances of this case, without compelling them to allow the widow one-third of the net income.

In the case of *Duke of Hamilton v. Mohun*, 1 P. Wms. 118, where the duke had agreed with his wife's mother, before marriage, that after marriage he would release her from all accounting for the mesne profits of his wife's estate, and the mother did not assert her right of dower in the estate, on the idea (as we may fairly infer) that she was released from giving an account of the mesne profits of the estate, which had been in the mother's hands as trustee, the court, after holding void the original agreement to release the mother from liability to account, nevertheless gave her representative, she being dead, one-third of the yearly income. Lord Chancellor Hardwicke, in deciding the case, said: "As to the want of a formal assignment of dower, that is nothing in equity, for still the right in conscience is the same; and if the heir brings a bill against the mother for an account of profits, it is most just that a court of equity should, in the account, allow a third of the profits for the right of dower."

The finding of the jury, by which the deeds under which Mrs. Ames remained in possession and took care of the property were set aside, as not having been valid for want of delivery, did not find fraud. Mrs. Ames supposed that she was the owner of the fee, and it was long before it seems to have been disputed by the plaintiff. They lived together for a time, and the estate was taken care of, and the moneys received and paid on account of the estate in her name.

There is no complaint that the income of the estate has been wasted. Being thus in possession, and taking care of the income and the property, as the owner, she has made no application for dower. She was mistaken as to her title, and her son came into a court of equity to call her to account for the rents collected, as he had a right to do. If the account had been taken and had gone into a decree in her lifetime, she would, in equity and good conscience, have been entitled to be allowed her right as widow. I think that it

would have been the duty of the court to require such an allowance in stating the account. This, under the circumstances, would be the equity which the heirs seeking an account should be compelled to do. The rule of damages in suits for dower may be different in England from our rule in Ohio, running back, in England, to the time of the husband's death. I do not think that that difference affects the application of the principles of equity to this case.

But it was claimed that the death of Anne Ames, before the rendition of the decree, put an end to that equity, so that her will, giving all her property and effects to Olivia, was ineffectual to pass it.

I regard the equitable right of Anne Ames to have arisen out of her relation to the family and estate, and out of the circumstances under which she collected the rents and took care of the property, and that right was as much vested in equity as if it had been a legal estate, and can not now be disregarded. I regard the case of *Duke of Hamilton v. Mohun* an authority to this effect. Taking the statement of the master in all other respects to be correct, the result is, in general, to divide the net income of the estate, for the time specified, into three parts, and to give to Mrs. Kater one-third in her own right, and one-third under her mother's will, and the other third to the plaintiff.

On the whole case, I conclude to affirm the finding and conclusions of the master as to items, with the exception that the grand result is to be modified by crediting the estate of Anne Ames with one-third of the net income. I have not attempted to state the balance which will be coming to the plaintiff under the decree drawn upon this principle. Nor do I know whether it will be necessary to refer the case back to the master. It is probable that the counsel, acting upon the principles of this opinion, and aided by the statement and findings of the master, can frame the decree without further reference.

LEWIS E. MILLS, TRUSTEE, v. THE BOARD OF EQUALIZATION  
OF THE CITY OF CINCINNATI.

An erroneous valuation for taxes by the assessor is not void, but may be corrected by the Board of Equalization on appeal to them by the party aggrieved.

The Auditor will not be enjoined from placing on the duplicate the valuation for taxes of realty returned by the assessor, or the Board of Equalization be enjoined from acting thereon, until an appeal from such valuation has been had to the Board, and their action has been had on such appeal.

This case came on upon the plaintiff's motion for a restraining order.

*L. E. Mills, for plaintiff.*

*W. S. Scarborough, County Solicitor, contra.*

STOREY, J. The plaintiff, who is owner, in trust, of several valuable storehouses and lots, situated in the Second ward of Cincinnati, complains that Peter Gibson, who has been regularly appointed assessor of real property in that portion of the city, has appraised the real estate he represents, and returned the same for taxation at a sum far beyond its real value in money; that the assessor has disregarded the law which defines his duties and authorizes him to act; that instead of ascertaining the real value of the property in money, he has affixed the price at which it would probably sell upon a credit of one or two years, thereby greatly increasing the sum for which the plaintiff can be legally taxed, and imposing upon him a burden he ought not to bear. The assessment thus made, it is charged, was made under the instructions of the Auditor, and is admitted, as is said by the assessor, to be opposed to his own opinion of what the true bases of taxation should be under the statute. These allegations are sustained by the affidavits of the assessor and

the statement under oath of various property holders in the ward, whose lots and buildings have been similarly taxed, the assessor having pursued the same course as to all the real estate in the ward in assessing the plaintiff's property.

The Auditor denies that he gave any other instructions than those he has attached to his answer, and which it is admitted were furnished to the other assessors.

It is further charged that the assessments thus made under the instructions were directly opposed to the requisition of the statute, inasmuch as the land is first valued separate from the improvements; the value of the improvements has been found and added to the appraisal of the land, while the aggregate of both is then made the basis of taxation.

In thus assuming to act, the assessor is charged to have mistaken his duty, imposing a fictitious and oppressive value upon the plaintiff's property, a greater value than it would sell for in cash, or even on a credit.

It is further averred that the defendants, who compose the Board of Equalization, have no power to reduce the assessment, as it was illegal, and therefore void, not being a mere error of opinion on the part of the assessor, but such an excess of power that we must hold him to have acted *ultra vires*.

Upon these facts a restraining order is asked to prevent the Auditor and Board of Equalization from any action upon this assessor's return, as it can not be regarded as the predicate of any further proceeding on their part, either in placing the property on the duplicate, or correcting the assessment itself.

A careful consideration of the allegations in the plaintiff's petition, sustained as they are by the proofs in the case, to our apprehension, presents this single question: Whether the assessment is absolutely void, or is merely erroneous? If the former, the defendants must disregard it; if the latter only, it can be amended by the Board of Equalization in the mode prescribed by the statute.

It is admitted by the counsel for all parties that the as-

assessment of real property can only be made by ascertaining its true value in money—in other words, not what it might bring at auction or at a forced sale, but at what it can fairly be estimated in cash. No special price can be taken into the account on the one hand; nor an unreasonable low estimate on the other.

Hence it is there is confided to the assessor's office a just discretion, the privilege of arriving at his conclusions by comparing one lot by its improvements, in the same locality, with another; its situation, its convenience to business, and in our rapid progress, as a city, not to disregard altogether the elements which may fairly be supposed to enter into the estimation of real estate by those who have especially devoted themselves to its purchase and sale; for thus a conclusion may be reached both just to the state and the property holder.

But in the performance of his duty the officer is not supposed to be always infallibly correct. He may, and probably will, err in the result of his labors, if his acts are to be rigidly examined and determined by every technical requirement of the law, which is merely directory and not, in terms, mandatory. If he is authorized to discharge the duties he has assumed, his subsequent acts which involve calculations connected with sound discretion, or a deviation from a prescribed rule, may be the foundation upon which error may be charged, while the power to perform the act still exists. This is the analogy we may find in every proceeding where jurisdiction is conferred, and there is error only in the discretion.

In the case before us the assessor is clothed with ample power. His election to the office and subsequent qualification by oath are admitted, but it is claimed he had no authority to assess the plaintiff's real estate in any other mode than the statute has provided, and having done so, his assessment is void.

If, however, we regard the assessment as merely representing the opinion of the assessor, and his figures prove

what his valuation really is, it seems to us that it is immaterial, if his assumption of what is the true value can be shown to be excessive, upon whatever basis he made it. The fact exists.

And the same view may be taken of the allegation that the land is valued distinct from the buildings, for we find, although separate appraisements are made, yet the aggregate of both is carried out by the officer in his return, as his estimate of the entire property. We see no objection to such an assessment in matter of form, for it must be admitted that no injury is suffered by the tax-payer, and no advantage is gained by the state, the county, or the city by the process.

We are satisfied that an unequal assessment has been made upon the plaintiff's property, and it is unjust also, as it is greatly above the real value of the property in money; we are also of the opinion the estimate of the assessor ought not to be made the basis of taxation by the Auditor, and did not we believe that the plaintiff has full and adequate remedy by an appeal to the Board of Equalization, we should be disposed to interfere in a summary way to relieve him.

That tribunal was created for the express purpose of equalizing the burdens to be borne by the owners of real estate, as well as to protect the government from loss by inadequate and low valuations. The object to be gained was the correction of errors, mistakes, and omissions on the part of the assessor, and the imperative duty of the board is to examine carefully every return when objection is made, reduce it if they are satisfied it is too high, and increase it if they should find it be too low. The language of the fifty-ninth section of the tax law, S. & C. 1454, is clear and explicit: "They shall raise the valuation of such lots as have been, in their opinion, returned below their true value, and they shall reduce the valuation of such tracts and lots which have been returned above their true value."

The plaintiff may, therefore, have full and adequate relief

from a tribunal fully empowered to grant all he now seeks to accomplish. He does not, therefore, require our aid.

It must be an extreme case to authorize our interference to the extent claimed by the plaintiff, and should we declare the assessment void, we should virtually prevent the collection of any tax whatever. None could be levied until the next year, as there can not be an assessment at any other time than that appointed by law, while the effect would be to disturb and disarrange the whole system of taxation for the present year, a dilemma in which we ought not to place the officers of the county or the city—unless no other alternative is left us.

The taxing power in every government is one of the highest prerogatives of sovereignty. It is essential to its very existence as a state or an ordinary municipality, and burdens are imposed on property by taxation as an equivalent for the protection given to the owner in the enjoyment of what he claims to be his. But the rate of taxation should be equal. To use the language of our State Constitution, "All property must be taxed by a uniform rule;" and yet it is difficult so to arrange a general system that shall operate in every respect to produce strict uniformity in the varied interests necessarily involved in the assessment of a tax.

While the important object to be attained should be kept in view, the details of any system of taxation can not always, indeed can seldom, be adhered to with strict accuracy; and while the machinery of the system is directed, if not controlled, by men who are not, as a general rule, the clearest headed and wisest, there will be apparent inequality, if not injustice, urged by the property owners against the officer.

Such a result might reasonably be expected, and the wrong, if any, that is done to the individual can only be remedied in the future by the election to office of those who understand their duty, and are not unwilling to perform it.

In the case before us, we believe the assessor honestly felt



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Vail's Adm'r v. Junction Railroad Co.

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he was discharging the requirements of the law, under the instructions of the Auditor, and, as he testifies, the explanations given him personally by that officer. Still he erred, for no such construction of the law could be allowed to the Auditor. The law itself was to the assessor his only guide as to the proper mode of determining the value of real estate for taxation, and he must follow it, or else his estimate should be revised and amended by the Board of Equalization.

The law of May, 1856, S. & C. 1157, does not, we think, apply to the case, as the parties now stand before the court. If the Board of Equalization shall hereafter refuse to afford the relief to which the plaintiff is entitled, he may, if proper ground for our interference shall exist, again invoke our aid.

The prayer for a restraining order is now denied, but the petition will be retained.

A decree, by consent, in favor of the defendants was afterward entered, and the case taken to General Term on error, where the opinion above given was affirmed. An application was made to the Supreme Court for leave to file a petition in error, which was refused.

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SARAH A. VAIL'S ADM'R v. THE JUNCTION RAILROAD CO.

The damages for a breach of the covenants in a deed may be assigned, and in a suit brought by the assignee therefor the measure of damages and recovery is limited by the consideration actually paid and interest; and the court will not be bound by the amount set forth in the deed, but may find the real consideration by parol.

The case is fully stated in the opinion.

*Collins & Herron*, for plaintiff.

*King, Thompson & Avery*, contra.

HAGANS, J. This case is submitted to the court.

Bates, Neal, and B. F. Vail, being in partnership, contracted with the Junction Railroad Company to construct, and did construct, certain portions of the road. The railroad company, being indebted to them, entered into an agreement of settlement on the 23d July, 1861, by which said indebtedness was to be discharged by the conveyance, by said company, to them of certain real estate in Pulaski county, Ind., at its cost to the company at that date. Accordingly, at that date the company conveyed, with covenants of general warranty to Bates & Neal, with the assent of Vail, the lands named, in consideration of \$3,700; also covenanting that they were the true and lawful owners thereof and had good rights to sell and convey. To all these lands, except eighty acres, the defendant had no title at all at the date of the conveyance nor subsequently.

On the 23d June, 1869, Bates & Neal, in consideration of \$3,700, conveyed the same property to Sarah A. Vail, in her lifetime, by quit claim deed, with no covenants excepting against their own acts. In the body of the deed, following the description of the lands, is this assignment, "Also all right of action arising out of the covenants contained in said deed," referring to the deed from the defendant to Bates & Neal, "to the grantors herein; all of which covenants, and all claims and rights arising therefrom, are hereby assigned and transferred to said Sarah A. Vail."

A good deal of contradictory testimony is taken to show the value of these lands to which the defendant had no title, and it appears that the parties were not nice in their estimate of the value of the lands or in ascertaining the amount of indebtedness.

It is agreed that a breach of the covenants of warranty and ownership occurred as soon as the covenants were made, and an action might have been maintained for damages by Bates & Neal. It is also agreed that the assignment of these damages, contained in the deed to Sarah A. Vail, is suffi-

cient to vest the title thereto in her, and that she may maintain the action.

Without the assignment these damages would not have passed to the intestate by the usual covenants in a deed.

The only remaining question is as to the measure of damage. The plaintiff claims that the consideration expressed in the deed is the true measure of damages; while the defendant claims that the real value of the premises at the time of the conveyance is the true consideration and furnishes the rule.

In *Foot v. Burnet*, 10 Ohio, 817, which was a suit for damages for a breach of a covenant against incumbrances, the Supreme Court allowed merely the amount paid to remove the incumbrance, fixing the limit to the consideration-money paid for the land and interest. In *Adm'r's Backus v. McCoy*, 8 Ohio, 211, the Supreme Court say, "The rule of damages under a covenant of seizin, when a breach has been shown, is the consideration-money and interest. It is the value of the land as ascertained by the parties, and the money comes in lieu of the land lost by the non-performance of the contract." And in *King v. Kerr's Adm'r*, 5 Ohio, 94, the court, in an action for damages for breach of warranty in a deed, intimate that the same rule should be applied.

Now, \$3,700 is the consideration expressed in the deed to Bates & Neal. This was a price fixed in settlement of a claim held by them against the defendant, to be paid for in lands, and the lands were probably obtained by the company in payment of stock subscriptions. It might be inferred fairly, that their cost to the company was much less really than the nominal sum expressed in the deed, as is usual in such transactions. And I have, therefore, looked very narrowly into the testimony as to value. Cases often occur, where, as here, the consideration fixed by the parties and expressed in the deed is nominal, and more than the real consideration. It is the real consideration of the conveyance and not that expressed in the deed, in the absence of any true standard ascertained by the parties themselves, that

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Eureka Insurance Co. v. Parks & Canfield.

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must furnish the rule to measure the damages. It can not be the amount of the debt found to be due on a settlement to be paid for in lands, where amounts are exaggerated on one side and values on the other, as appears by the circumstances shown in this case, that can alone furnish the true measure of damages. But when it comes to reduce the transaction to a true basis, the real consideration must furnish the rule. In no case can the damages exceed the consideration and interest. *Foot v. Burnet*, 10 Ohio, 335. And inasmuch as the true consideration of a deed may be shown by oral testimony, I think this is a case which authorizes me to look into the testimony on this subject. The testimony as to value ranges all the way from \$5 to \$28 an acre. The consideration expressed in the deed is about \$15.50 an acre. I think, under all the testimony and the circumstances, that \$13.50 an acre was about the true value of these lands.

There were two hundred and forty acres conveyed, of which the title to eighty acres is good, and as to which there can be no recovery. Judgment may therefore be taken for the value of one hundred and sixty acres at the rate of the value for the whole, with interest from July 23, 1861.

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THE EUREKA INSURANCE COMPANY v. PARKS & CANFIELD.

The defendants resided at Aurora, Indiana, and were shipping a quantity of hay to New Orleans in barges. Hayes, who also resided in Aurora, sent up to the office of the plaintiff, at Cincinnati, an application for insurance on the hay. The policy was issued, and the suit is for the premium. Hayes received a commission from the plaintiff. The defendants set up as a defense the statute of Indiana, that a foreign insurance company shall not enforce any contract made by an agent in Indiana; and also the act of Indiana, that it shall not be lawful for any agent of a foreign insurance company to take risks, or transact any business of insurance in said State, without first producing a certificate of authority from the auditor of said State.

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Eureka Insurance Co. v. Parks & Canfield.

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*Held*, that the insurance was not to be considered as transacted in Indiana, but in the State of Ohio, where the suit is brought, and is not affected by the law of Indiana against agents of foreign insurance companies. Nor would it be affected in the courts of Ohio, even though the law of Indiana should prevent its enforcement in that State.

TAFT, J. The defendants reside at Aurora, Indiana. They had several barge loads of hay they were sending to New Orleans. Mr. Hayes, who resides in Aurora, sent up to Cincinnati, and reported the application of the defendants for a policy of insurance. The policy was issued, or rather two policies on two different applications. The suit is for the premiums on the policies; and the defendants present, as a defense, the act of Indiana, which provides: "Sec. 1. That it shall not be lawful for any agent of any insurance company, incorporated by any other State than the State of Indiana, directly or indirectly, to take risks or transact any business of insurance in this State without first producing a certificate of authority from the auditor of the State," etc., adding the steps to be taken by the agent, none of which were taken on the part of any agent of this plaintiff.

The answer also set up another act, by which it was provided that a foreign insurance company should not enforce any contract made by an agent in Indiana unless qualified by a certificate of the auditor, as above stated. The act to which I have first referred was last enacted, and was set forth in the amended answer, and the act last mentioned was set forth in the original answer. One act made void the contract, a the other forbade the enforcement of it.

The two answers set up both acts; and the question is whether either act applies to this case.

The question is whether this transaction falls within the scope of the Indiana statute so as to cut off the right of the company to collect premium in the courts of Ohio, where the company is at home, and where the company issued the policy?

It seems to me that the contract of insurance was made

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Eureka Insurance Co. v. Parks & Canfield.

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here in Cincinnati, and that Hayes was the agent of the defendants in the procurement of this policy. The object of the legislation in regard to agencies for foreign corporations, in general, is to prevent their establishing offices in the State without placing themselves in a position to be responsible to their customers and the State. It is clear that Hayes, in the present case, had no power to take any risk on behalf of the plaintiff, either in Indiana or Ohio. He could report applications, and for that service or information the company paid him compensation. But the insuring was done here at the home office. It has been held, in 25 Ind. 536, that if a loss be sustained in such a case the company would be liable, even if the policy had been procured by an agent in violation of the law.

There is nothing illegal in this contract, so far as our own State, where it was made, is concerned, and I think our courts could not refuse to enforce it, even if the law of Indiana should declare it void. *McIntyre v. Park*, 3 Met. 207; 4 Ind. 96; 2 Dutcher, 268; 3 Dutcher, 645; *Hayes v. Colter*, recently decided in the General Term of Superior Court of Cincinnati.

The question has arisen substantially in the New York courts, *Hyde v. Goodnow*, 3 Comst. 266, in which it was held that a policy issued in New York, by a New York company, on property in Ohio was valid, notwithstanding the company was limited in its powers of contracting to the State of New York. The contract was deemed a New York contract. *Western v. Genesee Mutual Insurance Co.*, 2 Kernan, 258, is very much in point. Also, *Huntley, Receiver, v. Merrill*, 52 Barb. 626, which was a suit on a premium note, and so more particularly in point.

# INDEX.

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## ADMINISTRATORS AND EXECUTORS—

An administrator acting in good faith is not responsible for loss incurred by the failure of a bank of good credit, wherein he had deposited the funds of the estate, to the credit of the estate, and did not mingle them with his own. *Ramsey v. McGregor et al.* 327.

See CONTRACT, 4; LIMITATION OF ACTIONS, 6; RECOUPMENT, 2.

## ADMIRALTY. See JURISDICTION.

AGENCY. See BAILMENT, 3, 4; CONTRACT, 8; COVERTURE, 2; INSURANCE, 2; PARTNERSHIP, 1; SPECIFIC PERFORMANCE, 1; STATUTE OF FRAUDS, 2.

## ANTENUPTIAL AGREEMENT. See DOWER.

## ASSENT. See PARTNERSHIP, 4.

ASSESSMENT. See AUDITOR OF COUNTY; BOARD OF EQUALIZATION, 2; DEDICATION, 1; MUNICIPAL CORPORATIONS, 3, 4.

## ASSIGNMENT. See PRACTICE, 13.

## ASSIGNMENT OF ERRORS. See PRACTICE, 19.

## ATTACHMENT. See DOMICILE; PRACTICE, 9, 13.

## AUDITOR OF COUNTY—

When a tract of land was listed and assessed, and the taxes paid, and afterward an error in the number of acres in the tract was discovered, which the owner reported immediately to the auditor, that officer is not authorized by section 70 (2 S. & C. 1463) of the tax act to assess and levy, himself, upon said tract the back taxes for the excess discovered. *Ludlow v. Willich*, 315.

See BOARD OF EQUALIZATION, 2.

## BAILMENT—

1. A common carrier having given a bill of lading for goods can not relieve himself from liability, on the ground that the goods were never received by him, except by the clearest proof of that fact. *L. M. G. & X. R. R. Co. v. Dodds et al.* 47.
2. A stock and gold broker in Cincinnati received from a customer \$4,000, on account of margin on \$40,000 of gold to be purchased, together

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 Bill of Exceptions—Board of City Improvements.
 

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with an order as follows: "Buy for my account and risk \$40,000 gold, limit 44½ to-day, upon which I agree to keep ten per cent. margin in cash. If the said margin is not kept good, you are authorized to buy or sell the same at your discretion." The broker purchased the gold through an agent in New York, where it was kept on deposit in bank, and the customer failing to keep up the ten per cent. margin, the broker, upon sufficient notice, sold the gold at a loss. *Held*, that the customer could not recover back the money deposited as a margin on the ground that the broker had failed to comply with his contract, although he kept the gold, when purchased, in a bank in New York, in his own name and not in the name of the customer, nor in a separate parcel, but subject to his order, in accordance with the well-known usage in that kind of business. *Patterson v. Keys et al.* 94.

3. The defendants were stock brokers, and had money belonging to the plaintiff, to the amount of \$1,600, on deposit as a margin on purchases and sales of stock made and to be made, under a contract between the defendants and plaintiff. The plaintiff gave an order to the defendants to sell his Pittsburg, Fort Wayne and Chicago Railroad Company stock, and two hundred shares of Erie stock, which was one hundred more than he then had on hand. This order was not obeyed, but a larger amount of Erie stock was purchased, contrary to the plaintiff's order. If the order of the plaintiff had been obeyed, the amount on deposit would have been increased to \$2,100, while the course taken resulted in a loss. The plaintiff called for his money, and was told by the defendants that if he would let it remain they would work the account, and would repay him all his money, viz: the \$2,100, acknowledging their obligation to refund it. The defendants continued to speculate on the fund, and lost it all and more. *Held*, that the defendants worked the account at their own risk, and were bound to refund to the plaintiff the \$1,600 which he had when he gave the order which was disobeyed, and the additional \$500 which he would have had if his order had been obeyed. *Hollingshead v. Green et al.* 305.

4. Suit brought on receipt given by V. to G. for money to be invested in stocks, and "to manage the same as my own," with V.'s knowledge. G. invested the money, with an equal amount of his own, in a "pool," where nearly the whole was lost, and, on a settlement with their brokers, an equal dividend was paid to each, accepted, and no exception taken by V. at the time. *Held*, V. could not hold G. liable for the money advanced. *Van Camp v. Gilbert*, 358.

See COMMON CARRIER, 2. CORPORATIONS, 5.

BILL OF EXCEPTIONS. See PRACTICE, 16, 19, 21.

BILL OF LADING. See BAILMENT, 1; SALE.

BOARD OF CITY IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 1-4.



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Board of Equalization—Confirmation of Sale.

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## BOARD OF EQUALIZATION—

1. The city board of equalization are entitled to compensation for their services from the county treasury, and county commissioners are obligated to fix and allow the same without reference to the rate of the compensation allowed the county board of equalization. *Baum et al. v. County Commissioners*, 553.
2. An erroneous valuation for taxes by the assessor is not void, but may be corrected by the board of equalization on appeal to them by the party aggrieved. The auditor will not be enjoined from placing on the duplicate the valuation for taxes of realty returned by the assessor, or the board of equalization be enjoined from acting thereon, until an appeal from such valuation has been had to the board, and their action has been had on such appeal. *Mills v. Board of Equalization*, 563.

BOND. See PRACTICE, 5.

BOUNDARY. See DEMD.

BROKER. See BAILMENT, 2, 3.

BUILDING ASSOCIATION. See CORPORATIONS, 6.

CHARTER. See CORPORATION, 5.

CHECK. See CONTRACT, 9; DEMAND; NOVATION; PAYMENT.

CITY COMMISSIONER. See MUNICIPAL CORPORATIONS, 2.

CIVIL DEATH. See EVIDENCE, 4.

CLEARING HOUSE. See NOVATION, 1, 2.

CODE. See COVERTURE, 2; INSURANCE, 2; LIMITATION OF ACTIONS, 3; MUNICIPAL CORPORATIONS, 3; PARTNERSHIP, 4

COMITY. See CONFLICT OF LAWS.

## COMMON CARRIERS—

1. A telegraph company is bound to transmit to their destination all messages in the order of time they are received. *Davis v. Western Union Telegraph Co.* 100.
2. A wrongful delivery of goods after an order given by the consignor, founded on the inability of the consignee to pay, to stop *in transitu*, renders the carrier liable; and the subsequent receipt by the consignor of the consignee's note packed in blank with the goods, and an attempt on his part to collect it, does not relieve the carrier's liability unless the note be paid. Where the facts justify it, the notice not to deliver constitutes part of the carrier's contract. *Adams Express Co. v. Wentworth*, 142.

See BAILMENT, 1; NEGLIGENCE, 2; PLEADING, 6.

CONFEDERATE STATES. See CONSTITUTIONAL LAW.

CONFIRMATION OF SALE. See PRACTICE, 20.

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Conflict of Laws—Constitutional Law.

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## CONFLICT OF LAWS—

1. Where the plaintiff and cross-petitioners were slaves: *Held*, that no comity now required a recognition and enforcement by this court of the laws of slave States, which made all slave children illegitimate, and so prevented collateral inheritance among slaves. *Price v. Slaughter et al.* 429.
2. The defendants resided at Aurora, Indiana, and were shipping a quantity of hay to New Orleans in barges. Hayes, who also resided in Aurora, sent up to the office of the plaintiff, at Cincinnati, an application for insurance on the hay. The policy was issued, and the suit is for the premium. Hayes received a commission from the plaintiff. The defendants set up as a defense the statute of Indiana, that a foreign insurance company shall not enforce any contract made by an agent in Indiana; and also the act of Indiana, that it shall not be lawful for any agent of a foreign insurance company to take risks, or transact any business of insurance in said State, without first producing a certificate of authority from the auditor of said State. *Held*, that the insurance was not to be considered as transacted in Indiana, but in the State of Ohio, where the suit is brought, and is not affected by the law of Indiana against agents of foreign insurance companies. Nor would it be affected in the courts of Ohio, even though the law of Indiana should prevent its enforcement in that State. *Eureka Ins. Co. v. Parks et al.* 574.

See SET-OFF.

CONSIDERATION. See CONTRACT, 5; DAMAGES, 5.

CONSIGNOR AND CONSIGNEE. See SALE.

## CONSTITUTIONAL LAW—

1. In November, 1861, the relation existing between the people and State of Ohio, and the people and State of Arkansas, one of the Confederate States then waging war against the United States, was that of enemies, and the judicial proceedings under such Confederate States government do not fall within section 1, of article 4, of the constitution of the United States, which provides that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." *Pennypit et al. v. Kellogg et al.* 17.
2. A vendee, in quiet possession under the deed, is bound to pay the notes and rely on the covenants in the deed for indemnity against any future eviction; such is the settled construction of the contract between the parties; and an act passed after suit on the notes, but a few days before judgment, authorizing a vendee in such a case to have the title investigated and damages for defect of title assessed and set off against the notes given for the purchase money, is not to be construed as applicable to existing deeds; and if it were necessary to so construe the act, it would be unconstitutional. *Great Western Stock Co. v. Saas*, 21.

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Constructive Trust—Contract.

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3. The act of the legislature of Ohio, passed May 4, 1869, authorizing any city of the first class, having a population exceeding one hundred and fifty thousand inhabitants, to construct a railroad terminating in and essential to the interests of such city, and to borrow as a fund for that purpose a sum of money not exceeding ten millions of dollars, is not a violation of section 6, article 8, of the present constitution of the State of Ohio, which provides: "That the general assembly shall never authorize any county, city, town, or township, by a vote of the citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever, or to raise money for, or loan its credit to, or in aid of, any such company, corporation, or association." The said act, and the act of March 25, 1870, supplementary thereto, are constitutional and valid. *Walker v. City et al.* 121.

CONSTRUCTIVE TRUST. See LIMITATION, 5.

CONTEMPT. See PRACTICE, 9.

CONTRACT—

1. W., the owner of an insurance policy, wrote to the company, "Consider your policy, No. 39, as canceled from the 18th inst., and make a new policy from that date for one year, with privilege added, at same rate." The company answered, "I can not agree to proposed change, and therefore cancel, *pro rata*, charging returned premium." A subsequent loss occurred prior to the date of the expiration of the original policy. *Held*, that W.'s letter was not a cancellation of the policy, but, until accepted, a mere proposition so to do. That the proposition was indivisible, and if not accepted as a whole the original contract remained unaltered, and W. was not estopped to sue thereon. *Wilkins v. Tobacco Ins. Co.* 349.
2. The city of Cincinnati contracted with Bearly to erect a school-house for \$81,000, and Bearly made subcontracts with plaintiffs and with others to do parts of the work. The plans of the building were in some respects modified, and considerable extra work, including an extra privy, was done, increasing the cost beyond the original contract price. The contractor failing to pay plaintiffs, they served a notice of the balance due on their claim for work which would have been included within the terms of the original contract. At the time of the service of the notice by the plaintiffs, the city had paid Bearly the entire sum of \$81,000, which was the amount called for by the original contract, but the city nevertheless owed Bearly \$1,377 by reason of the extra work. Several of the defendants filed claims for work done on the same building, but not provided for in the original contract, unless it were under the clause providing that extra work should be stipulated for in writing and signed by the parties. *Held*, that the formalities required by the contract for extra work might be and were waived, and that the extra work was to be regarded as done under one general contract embracing the entire job, and that the plaintiff-

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 Contract.
 

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iffs were entitled, by priority of notice, to establish a priority of lien upon the fund in the hands of the city against those who performed the extra work as well as against those claimants whose work was done within the terms of the original contract. *Held*, also, that the city clerk's office was the proper place at which to serve the notice, and the clerk the proper agent on whom to serve it, and that the plaintiffs, having first presented the statement of their claim at the clerk's office to the clerk, were entitled to be first paid out of the fund. *Rankin v. The City*, 393.

3. The defendant refused to pay the insurance on a steamboat lost by fire, on the ground that two competent watchmen were not employed, and at the time of the accident no watchman was on duty. The plaintiff says, that by agreement one watchman was waived, in which respect the policy ought to be reformed; but that in fact two were employed, and one was on duty at the time. The testimony was to the effect, that while the watchmen had gone to their supper, on the top of the river bank, the boat took fire and was burned; also, that it is the usage for the watchmen to get their meals on shore when the steamboat is in port. The judge instructed the jury to inquire whether one watchman was waived by the agreement or not; if not, whether two watchmen were employed, and one was on duty at the time, within the fair intent and meaning of the policy. A verdict was returned for the plaintiffs, and the defendant's motion for a new trial was overruled. *Held*, that having due regard to the circumstances and the purposes of the stipulation contained in the policy of insurance, the charge to the jury was correct. *Gibson et al. v. Farmers and Mechanics' Ins. Co.* 410.
4. Action on policy of fire insurance, issued to "E. W. B., executrix," on property devised in equal moieties to the testator's children, and E. W. B., his widow and executrix. It was proved that the underwriter was informed that the policy was to be for the benefit of the estate of the deceased. *Held*, that evidence to explain the object of the application for the policy, and the manner of its issue, was admissible, not to vary the contract, but to aid the court in interpreting its true meaning. That E. W. B., in her capacity as trustee for creditors and devisees, had, as executrix, an insurable interest in the whole property. *The Globe Ins. Co. v. Boyle et al.* 444.
5. Where A., B., and C. enter into a tripartite contract, by which A. agrees to do one thing and B. agrees to do another thing, in both of which C. is interested, and C. agrees to do one thing in which A. is interested, and another in which B. is interested, and A. tenders performance, C. can not set up, as a defense against his obligation to perform that in which A. is interested, the fact that B. failed to perform his contract. In such a contract the promise of each must be regarded as made in consideration of the promises of the other parties, so that either party, who is not himself in fault, may require the performance by each other party. *Wade v. Pollock et al.* 453.

## Contract.

6. A policy of life insurance contained in the premium clause the words "in consideration of the quarterly premium of \$30.24, to be paid on or before the 28th d. of November, February, May, and August," and in the payment clause, "the balance of the year's premium, if any, being first deducted." *Held*, that the contract was for a yearly premium in quarterly installments, and the death occurring subsequent to the August payment, a deduction of the subsequent November, February, and May installments should be allowed. *Hesterberg v. Equitable Life Ins. Co.* 483
7. On March 13, 1850, A. mortgaged to B. real estate to secure five promissory notes, amounting to \$12,000 and interest, and sold to C. the said real estate, who assumed the said notes as part payment of the purchase money. On September 27, 1855, after the last note had fallen due, and while the ten per cent. interest law was in force, C. entered into an agreement with B., to which A. was also a party, to pay ten per cent. interest for one year on the amount, principal, and interest due at the time when the last note fell due, viz: September 1, 1855, in consideration of forbearance on the part of B. in collecting said notes and in foreclosure of said mortgage, and also in consideration of the extension of the payment of said notes and interest to the 1st day of September, 1856. C. continued to pay ten per cent. interest to March, 1868. The ten per cent. law was repealed April 1, 1859. *Held*, that this was an agreement for forbearance generally, for which C. agreed to pay ten per cent. interest, and that the time for which ten per cent. is to be paid is not limited in the contract to one year only. *Held*, also, that the excess of four per cent. can not be charged as a lien on the real estate under the mortgage; but a personal judgment against C., for this excess, can be taken in this case, according to the prayer in the petition. *McGregor v. Muller et al.* 487.
8. In an action for damages for selling without authority mess pork held under the following contract, viz:

"CINCINNATI, November 26, 1869.

"We have this day sold Blackburn Holmes 300 barrels of mess pork (our brand) at \$31.50 per barrel, to be delivered at his option, he paying interest at the rate of ten per cent. per annum; commission on sale, two and one-half; storage, six cents per barrel per month; margin of five dollars per barrel, to be paid us December 20, 1869; charges to commence from date.

[Signed,]

"EVANS, LIPPINCOTT & CUNNINGHAM."

Defendants aver, as a fourth defense, "that they sold said merchandise to the best advantage, and that they had the right under their contract with said Holmes, by virtue of the custom of the pork trade in Cincinnati, which custom was well known to said Holmes at the date of said transaction, to sell said merchandise for want of margin thereon, irrespective of the orders of said Holmes, the margin having been exhausted at and before said sale, and said Holmes hav-

## Contract.

- ing been notified to renew said margin, and having failed to do so for a reasonable time." *Held*, that this contract contains no provision for a renewal of the margin, and that a sale made after a demand of a renewal of the margin, without notice to the plaintiff of the time and place of sale, was not authorized by the contract, and that a custom of the pork trade in Cincinnati authorizing a sale under such circumstances, without such notice, would be unreasonable and in violation of law. Whether such a sale could have been justified under such a custom, if the contract had contained a provision for a renewal of the margin, *quære?* *Ent v. Evans et al.* 509.
9. Hamilton and Knight were accustomed to accommodate each other by an exchange of checks or notes. Knight gave Hamilton, who wanted to raise money, his check for \$1,210, on a bank, payable to the order of Hamilton, and at the same time took from Hamilton a like check, payable to his (Knight's) order, on the same bank, for the same amount. Hamilton transferred Knight's check to a creditor as collateral to an existing debt. *Held*, that the check was not to be considered as accommodation paper, and that H.'s creditor was entitled to collect the check from Knight, although Knight had not transferred or brought suit on the check which he had received and held from Hamilton. *Rankin v. Knight*, 515.
  10. Bates sold the Louisville Theater to Fuller, retaining a lien by the deed for \$26,000 of the purchase money, and providing that Fuller should keep on the property insurance in \$10,000, loss, if any, payable to Bates, on which policies Bates brings suit. Before the fire Fuller sold and conveyed the property for \$75,000 to Mark Munday, retaining by the deed a lien for \$50,000, with the condition that Munday should keep the property insured in \$10,000, loss, if any, payable to Fuller. *Held*, that the interests of a mortgagee and mortgagor are entirely distinct, and that the insurance procured by Munday, under his arrangement with Fuller, did not avoid the policies for \$10,000 procured by Fuller under the arrangement with Bates, notwithstanding the provision in said policies that "in case the insured or assigns should make other insurance without consent of the defendants," the policies should be void. That the word "assigns," in this clause, means assignees of the policy, and not assignees of the property. That the sale to Munday by Fuller, he retaining a lien for \$50,000 of the purchase money, did not avoid the policy issued by one of the defendants to Fuller, which contained the clause that "a transfer or change of interest of the insured, either by sale or otherwise, without consent of the defendant," should avoid the policy. The interest was not "transferred or changed" within the meaning of that clause in the policy. *Bates v. Commercial Ins. Co.* 523.
- See *BAILEMENT*, 1, 2; *COMMON CARRIER*, 2; *CONFLICT OF LAWS*, 2; *COVERTURE*, 2; *DOWER*; *MUNICIPAL CORPORATIONS*; *PRACTICE*, 3; *SPECIFIC PERFORMANCE*; *STATUTE OF FRAUDS*, 2.

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Contribution—Corporations.

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**CONTRIBUTION.** See **CORPORATIONS**, 3.  
**CORPORATIONS—**

1. A railroad company, chartered by special act of the legislature, empowering the directors, among other things, to transact all the business of the company and to sell and convey real and personal estate, and the right to complete any part of the road and put it in operation which the interests of the road may require, and having a choice of several routes and termini, may sell and convey to a competent vendee a portion of its right of way upon which no work has been done for a money consideration, and in satisfaction of its mortgage indebtedness on its whole line, leaving to its creditors the part of its road-bed upon which the bulk of its means has been expended. Such a sale and conveyance are not *ultra vires*, and the corporation is not thereby destroyed. The vendee of this right of way, having acquired and enjoyed all its benefits, shall not afterward be allowed to foreclose the mortgage, though he still holds the bonds which the vendor is entitled to have canceled. The mere fact that the property of the corporation was in the hands of a receiver at the time of the sale, can not affect the transaction if *bona fide*. *Donner v. Dayton and Cincinnati R. R. Co.* 130.
2. The liability of individual stockholders, under the constitution and statute of Ohio, is collateral to the principal obligation of the corporation, and is to be resorted to by the creditors only in case of the insolvency of the corporation, or where payment can not be enforced against it by the ordinary process of execution. Each stockholder of an insolvent corporation, in addition to the loss of his stock, is liable in a sum equal to the amount of his stock to all the creditors of the corporation. But between the stockholders themselves there is an equitable right to have a contribution by each, in proportion to his stock, and this equitable right will be enforced by the court in the creditor's suit, so far as it can be done, without prejudice to the paramount right of the creditors, who are entitled to be paid in full, and to hold each solvent stockholder to the full extent of his statutory liability, irrespective of those who are insolvent or beyond the jurisdiction of the court. In determining whether a stockholder is individually liable for debts of the corporation after a transfer of his stock, it is not essential to the validity of such transfer that it should be entered upon the register, or that a new certificate of stock should be issued; but it is necessary that the transfer be made in good faith and with consideration, and not merely to escape the liabilities of the corporation already incurred; nor can any transfer relieve the stockholder from his individual liability for debts of the corporation, incurred while he was a stockholder. The liability of a stockholder, from the time of the commencement of a suit, for an amount of indebtedness exceeding the principal of the stock owned by solvent stockholders within the jurisdiction of the court, is fixed

## Corporations.

- for the specific sum equal to the amount of each of such stockholder's stock, and the debt carries interest from the commencement of such suit, although the amount of the creditor's recovery may thereby exceed the stockholder's original liability. *Wehrman v. Reakirt et al.* 230.
3. Where a close corporation, created by special act of the legislature, which provides for no issue of stock, for the purpose of an endowment obtained moneys and issued the following certificate: "Ohio College of Dental Surgery. This may certify that Dr. A. J. Reeves is entitled to one share of the real estate property of the college, drawing an interest of six per cent., and transferable only in accordance with the constitution of the college association." *Held*, that the said certificate is a measure of the holder's interest in the corporate property, and is a contract with the holder to pay a certain rate of interest upon the said shares so long as the corporation carries out the purposes of its creation. Where no time is mentioned for paying the interest: *Held*, that it is payable in a reasonable time. *Bryant v. Ohio College*, 307.
  4. If, in an action by A. against B. and others, claiming an existing partnership, and asking for a dissolution and account between the parties, it should appear that the parties had been incorporated under the general law of Ohio, and the corporate body had not been dissolved by judicial decision, the action can not be sustained. What is evidence of the organization and existence of a corporation, and when a corporator is estopped to deny the fact of the incorporation. *Binninger et al. v. Gall et al.* 331.
  5. In 1856, S. subscribed for stock in the bridge company. By private acts in 1859 and 1861, and the public act of 1865, the company were authorized to issue "preferred stock," but did issue not only "preferred stock," but new "common stock," the old common stock having been disposed of. Subsequently the company sued S. for his unpaid subscription, and recovered judgment. S. paid the judgment, demanded his stock, and was tendered shares of the new issue of "common stock," which he refused, and brought suit to recover what he had paid. *Held*, the authority granted to issue "preferred stock" did not include the power to issue new "common stock." That as the company had disabled itself without S.'s assent from delivering the stock he had contracted for, he could recover as on a failure of consideration. That the judgment in the former suit did not necessarily determine the matter in the latter, and was no bar. *Sargent v. Cin. and Cov. Bridge Co.* 354.
  6. A. was the owner of ten shares in a building association, incorporated under the laws of the State (S. & S. 194) on June 4, 1868, and during the first year drew out of the treasury, in accordance with the constitution and by-laws of the association, \$4,000. To secure this amount, together with the dues, interest, and fines, B. gave a mort-



Costs—Covenant.

gage on real estate to the association for the sum of \$4,480, the premium of \$480 not being usurious by the laws of the State. A. stopped paying dues and interest July 27, 1869. The building association commenced suit in October, 1869, to foreclose the mortgage, and on March 3, 1870, obtained an order for sale. *Held*, that the present value of the mortgage in the decree of distribution, dated November, 1871, is obtained as follows: Ascertain, by proof, the probable duration of corporation, and calculate the dues and interest yet to come; then find the principal, which, with interest for the supposed time, will amount to the dues and interest already calculated; this will be the present value of the anticipated payments; to this principal, add the arrearages due, and the fines for the time between the date of default and the date of the entry of decree for sale, and the sum will be the present value of the mortgage. *German Building Association v. Flach et al.* 468.

7. G., owning shares of Marietta and Cincinnati Railroad stock in 1856, transferred the same to F., who gave receipts substantially as follows: "Borrowed of Wm. Green, 109 shares M. and C. stock, returnable on demand, with interest at the rate of eight per cent." In 1860, a mortgage was foreclosed, and the entire railroad property was sold at judicial sale, and a special act passed ratifying the sale and affirming the title and franchise of the purchasers, who were trustees appointed by and acting for the creditors. The same year a reorganization was effected, and to it, as "the Marietta and Cincinnati Railroad as reorganized," the trustees conveyed by deed. Subsequently, under the act of April 4, 1863, another deed was executed from the "Marietta and Cincinnati Railroad Company" to the "Marietta and Cincinnati Railroad Company as reorganized," thereby vesting it with the franchise, property, and rights of the old corporation, at which time the stock of the Marietta and Cincinnati Railroad Company had no market value. In suit by G., to recover from F. the value of the stock transferred: *Held*, that the sale of the road and franchises, together with the subsequent proceedings, acted as a complete extinguishment, for all practical purposes, of the Marietta and Cincinnati Railroad stock. That the stock having no existence when this suit was brought, no demand for its return and refusal was necessary, and the bringing of this action was a sufficient demand. That the transactions between the parties were, in fact, sales, and the vendee was bound to compensation; and the risk of the contracts being upon him, under the circumstances, that the measure of damages was the market value of the stock at the time of the loan in 1856. *Fosdick v. Green*, 537.

See LIEN.

COSTS. See PRACTICE, 7.

COUNTY COMMISSIONERS. See BOARD OF EQUALIZATION.

COVENANT. See WARRANTY, 1.

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 Coverture—Damages.
 

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## COVERTURE—

1. A married woman, tenant for years, may, by joining her husband with her, maintain a suit against the lessor for the specific performance of a contract to convey the fee to her, and when the purchase money is paid, can compel the execution of a conveyance, in the absence of a covenant to do so sooner. The lessor encouraged the permanent improvement of property by tenants for years, in expectation of their being allowed to purchase the fee, and afterward contracted accordingly. *Held*, that the estoppel against his afterward refusing to convey the fee, on the ground that the plaintiff was a married woman, ran with the land, and a subsequent purchaser from him, advised of all the facts, was bound thereby. *Baine et ux. v. Bickett et ux.* 181.
2. By contract with G., D. performed work and labor for necessary repairs on the separate property of G.'s wife. G. paid for part, and gave his note for the balance. G.'s wife verbally admitted that her husband was acting as her agent, and saw the work going on without objection. The property was conveyed to a third party by contract dated the day of service of process. In this suit, brought by D. to charge the wife's estate with satisfaction of a judgment already obtained on G.'s note: *Held*, 1. That the acceptance of G.'s note, and recovery of a judgment thereon, was no bar to the separate liability of his wife's estate. 2. That the wife's estate was liable for debt incurred by G. on the credit of her property; and after receiving the benefit she was estopped to deny her liability, which equity would enforce. 3. That it was not necessary to describe the particular property sought to be made liable, but that equity would enforce the demand against her property in general. 4. That the specific property on which the repairs were made was liable, after sale, in hands of purchaser, under section 79 of the Code. *Decamp v. Gaskill et ux.* 337.
3. An action will lie in favor of a married woman against a third person for enticing away and harboring her husband. *Clark v. Harlan*, 418.

See LIMITATION OF ACTIONS, 3.

CREDITOR'S LIEN. See PRACTICE, 9.

CUSTOM. See CONTRACT, 8.

## DAMAGES—

1. The purchaser of a horse warranted to be sound and safe can, upon a breach of the warranty, either rescind the contract by redelivering the horse and sue for the amount paid, or retain the horse and sue for the damages; in the former case, the rule of damages will be the price paid for the horse, and in the latter case, it will be the difference between the price paid and the actual value of the horse at the time of the sale. *Beresford v. McCune*, 50.

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 Damnum Absque Injuria—Deed.
 

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2. When dispatches are willfully delayed in their transmission, and a preference is given to one individual over another, whereby he receives damage, the court will not limit the damages he may recover against the telegraph company to the technical loss he has sustained, but rather award him a liberal compensation for the injury. *Davis v. Western Union Telegraph Co.* 100.
3. In an action for the death of an intestate caused by defendant's negligence, brought by an administrator for the benefit of the next of kin, the jury, in assessing damages, should look not merely to the degree of relationship the deceased bore to his kindred, but his condition of life at the time of his death, and the reasonable expectation they might have had of pecuniary assistance from him if he had survived. *Groff's Adm'r v. Cincinnati and Indianapolis R. R. Co.* 264.
4. The plaintiff was about to commence the publishing of a newspaper in Cincinnati, and was waiting for the machinery to arrive from New York, where it had been purchased, and the carriers had been notified of these facts when they contracted to carry the machinery to Cincinnati in four days, and a part of the machinery was lost. *Held*, that the carrier was liable for the direct and necessary consequences, including wages of men, who were idle for want of the machinery after the time when it was to have been delivered, and the cost of efforts made to recover the machinery, as well as the cost of replacing that which was lost, and which could only be replaced by ordering it from the manufactory in New York. *Cincinnati Chronicle Co. v. White Line Transit Co.* 300.
5. In an action on the covenants of warranty in a deed, the measure of damages and recovery is limited by the consideration actually paid and interest; and the court will not be bound by the amount set forth in the deed, but may find the real consideration by parol. *Vail's Adm'r v. Junction R. R. Co.* 571.

See BAILMENT, 3. DEDICATION, 2.

DAMNUM ABSQUE INJURIA. See PRACTICE, 18.

## DEED—

- B. holding under deed from C., "beginning sixty-six feet west of Vine street," giving thirty-three feet front, conveyed by same description to W., who again, by same description, leased back to B. The deeds of the premises previous to C.'s deed to B. erroneously described it, "beginning sixty-five feet west of Vine street," giving thirty-four feet front, and on this line the division wall stood. The adjacent owner tore down this wall, and B. sued W. on the covenants of his lease. *Held*, that the language of the deeds from C. to B. and B. to W. and the manifest intention of the parties, overcame the presumption arising from the existence of the boundary wall, and that B. was estopped to claim the right of quiet possession to more than thirty-three feet. *Brachman v. Smith*, 342.

See DESCENT AND DISTRIBUTION; ESTOPPEL.

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Dedication—Descent and Distribution.

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## DEDICATION—

1. It is no evidence of a dedication to the public, that the owner of wharf property, in using it for his own profit, leaves it open and free for public travel. Wharf property, like other real property, is subject to assessments made thereon by the city for the construction of a sewer in a street on which the said property abuts. *Boeres v. Strader*, 57.
2. If the owner permit a strip of ground to be used as part of a public street for a number of years, sufficient to show his purpose to grant it for that purpose, it becomes a part of the street and can not be reclaimed. An owner of property situated on a street, is not entitled to recover damages against the city, because the access to his property is rendered less convenient by a change in the grade of another street crossing that upon which his property is situated. *Eagle White Lead Co. v. City*, 154.
3. Where an owner of land dedicates a strip of ground twenty-five feet wide adjoining the land of his neighbor, on condition that his neighbor shall dedicate a like strip from his land, so as to make a street of fifty feet in width, and immediately opens his part of the street to public use, and permits it to be used by the public as a street for eighteen years: *Held*, that the condition was waived, and that the dedication had become absolute, although the neighbor had refused to dedicate his part of the street, and that the city council had the right to improve the street as dedicated, twenty-five feet in width, and assess the cost of the improvement upon the property abutting thereon. *Lloyd v. Hulbert*, 228.

DEFAULT. See PRACTICE, 3.

## DEMAND—

The holder of a check is entitled to wait until the day following its date before presenting it to the drawer, without discharging the drawer from liability. Such delay is not *laches* on the part of the holder. *Merchants National Bank v. Procter & Gamble*, 1.

See INSURANCE.

DEPOSITIONS. See PRACTICE, 4.

## DESCENT AND DISTRIBUTION—

1. J., before the wills act of 1840, devised lands to S., "to have and to hold during his natural life, and to his heirs, and in case of the decease of S. before maturity and without legal issue," then remainder over. *Held*, that by "heirs," the testator meant "children;" that the intention should overcome an arbitrary rule of law, and that, disregarding the rule in Shelley's case, S. took but a life estate. A court, in order to carry out the clear intention of a testator, must frequently regard the words "heirs," "children," and "issue," as convertible. *Reddish et al. v. Carter*, 283.

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Description—Equitable Conversion.

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2. A. conveyed to his son B. (who was the husband of the plaintiff) and his heirs a house and lot, "to have and to hold the same to the said B. during his natural life, and after his death to his heirs forever; provided that if the said B. should die without children, then the property was to revert to and vest in the heirs of A., the grantor herein." B. had seven children, but survived them all, and also survived his father A. *Held*, that B. took under said deed but a life estate, with a remainder in fee to his issue, subject to the condition that if he died without issue living at his death, the estate should revert to the heirs of A., and that on the death of B., the plaintiff, his widow, took no estate from her husband, either as heir or as widow. *Smith v. Hankins et al.* 449.

See EQUITY, 2.

DESCRIPTION. See DEED.

DISCHARGE. See PRACTICE, 3.

DOMICILE—

- A. left Ohio with his family for New York, with the intention to return if he could compromise with his creditors there, or to remain if he could not do so and could get employment, neither of which contingencies happened. Attachments were levied on his real estate in Ohio, and he shortly afterward removed to Kentucky. *Held*, that he was not a non-resident of Ohio within the meaning of the foreign attachment law. Mere non-residents for any length of time, unless aided by some unequivocal act showing intention not to return, will not cause the loss of domicile in the State. *Smith et al. v. Coleman et al.* 150.

DOWER—

An antenuptial contract, by which the wife is to receive less than the value of her dower interest in the estate of her husband, must be reasonable, as compared with the rest of his estate and in respect of the circumstances of the parties to the contract, in order to be enforced by a court of equity. Where the husband owned a lot of ground thirty-five feet in front on Fifth street in Cincinnati, and by an antenuptial agreement settled upon his wife, in lieu of dower, a life estate in one-third of ten feet only of said lot, and where the personal estate was found to be only \$74, such agreement was held not to be reasonable, and the court would not enforce it, by preventing the widow from having the dower assigned in the thirty-five feet of ground. *Garrison v. Grogan et al.* 302.

See EQUITY, 2; MERGER.

ENDORSEMENT. See SALE.

EQUITABLE ASSIGNMENT. See SUBROGATION.

EQUITABLE CONVERSION. See EQUITY, 2.

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Equity—Estoppel.

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## EQUITY—

1. Where the statute, for waste by a life tenant, forfeits the life estate to the reversioner, before judgment of forfeiture is ordered, equity will allow the life tenant to repair the waste and save the forfeiture. *Johnson v. Pettit*, 25.
2. A., in his lifetime, conveyed all his real estate equally to his two children, F. and O., his wife not joining. After his death, F. and O. each made deeds of their respective shares of the real estate to the widow, their mother, who for many years collected the rents, and claimed and enjoyed the property as her own. Recently, F. brought a suit against the widow to set aside his deed and to recover his half of the property, and succeeded by a verdict of a jury finding that his deeds had never been delivered so as to give them effect. He also sought an account of one-half of the rents and profits while the widow had received them, which was ordered, but before the court had acted upon the report of the master, the widow died. *Held*, that although the widow, claiming the fee, had not applied for dower as widow, and was bound to account for the rents and profits, she was entitled to be credited in the account as widow with one-third of the net profits, on the principal that in seeking equity, the plaintiff must do equity. That lands purchased by the widow and paid for, partly by the proceeds of other lands of the estate which she had sold, and partly by the rents and profits of the estate, were to be divided as lands of the estate so far as they were paid for by the proceeds of sales of lands of the estate, and to be distributed as personalty so far as they were paid for by the rents and profits. *Ames v. Ames*, 559.

See COVERTURE, 1; RECOURPMENT; SPECIFIC PERFORMANCE, 1; STATUTE OF FRAUDS, 2.

EQUITY OF REDEMPTION. See ESTOPPEL, 5.

ERROR. See PRACTICE, 16, 20.

## ESTOPPEL—

1. A judgment, in a suit by a contractor for a paving assessment, against one of the owners of property fronting on the street, is not conclusive as to the rate of compensation in another action brought by the same plaintiff against other owners. *Leonard v. O'Hara*, 42.
2. A. brings suit for damages against B. on the ground that in a previous suit between the same parties, by the fraud and false swearing of B., the judgment of the court was in his favor and against A. *Held*, such an action is not maintainable. What once has been decided before a court of competent jurisdiction can not be brought into controversy in another suit, on the ground of surprise. *McCafferty v. O'Brien*, 64.
3. When words in a deed, clearly granting an estate without limitation, are followed by others excepting a part of the estate granted, the

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 Estoppel.
 

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- part intended to be excepted must be as clearly described as the property originally conveyed, to give any force to the exception or limitation. A. conveyed all his interest in lands to B., but in the deed, subsequent to the granting clause, were inserted words declaring the intention was to convey only a part of A.'s interest. *Held*, that A. was estopped, and that his whole title passed. *Cook v. Wesner et al.* 249.
4. Action against A., as administrator. A. pleaded the statute of limitations, and that the matter had finally been disposed of in the probate court, and no appeal taken. *Held*, that unless irregularity was shown, the proceedings in the probate court were a complete bar. *Ramsey v. McGregor et al.* 327.
  5. M., the owner of the equity of redemption in lands, died before suit brought in the common pleas to foreclose the mortgage thereon. On the sheriff's return it nevertheless appeared that M. was "served at residence." After decree for sale, the plaintiff therein suggested M.'s death "after suit brought" on the record, and A. being sole heir at law to M., the action was revived as against him, and he answered by *guardian ad litem*, setting up his interest as heir. Subsequently a new decree for foreclosure and sale was made, sale had and confirmed. On suit by A., against the purchaser, to compel an allowance of redemption: *Held*, that as the record showed that M. was served with process, the court of common pleas *prima facie* had jurisdiction, and as the proceedings appeared to be regular on their face, its judgment could not be collaterally impeached, and the purchaser's title disturbed. *Hents v. Ward et al.* 387.
  6. The plaintiff sued the defendant, a physician and surgeon, for "carelessly, negligently, and improperly treating her arm," estimating her damages at \$3,000. After one trial, in which the plaintiff gained a verdict, and after this verdict had been set aside and a new trial granted, the defendant brought suit against the plaintiff, before a magistrate, to recover compensation for his services, and obtained judgment by default. *Held*, that such judgment is not a bar to the suit for damages in this court. *Sykes v. Bonner*, 464.
  7. B. contracted with H. to build H. a house, and employed S. to do the plastering. When the work was ready for the plastering, B. had become of doubtful credit, and S. applied to H. to know whether he had funds of B. under the contract to pay for the plastering, and was assured by H. that there would be funds of B. retained in H.'s hands to pay for the work to be done by S., and also gave his verbal promise that if S. would go on and do the work, he, H., would pay for it if B. did not. S. thereupon went on and did the plastering, but when he called on H. for the money, H. denied that he had any money of B. under the contract. *Held*, that H. was estopped to deny that he had funds to pay for the work; also, that the prom-

## Evidence.

ise was an original contract with S., not void under the statute of frauds, as a verbal promise to pay the debt of another; that though the promise was first alleged in the reply, and might properly have been ordered to be stricken out of the reply as a departure, yet, as leave would have been given to put it in the petition by amendment, if stricken out of the reply, the error in overruling the motion to strike out was not prejudicial to the defendant, and so was not a ground for reversing the judgment rendered after a trial on the issue as made in the reply. *Hiltz v. Scully*, 555.

8. A married woman, tenant for years, may, by joining her husband with her, maintain a suit against the lessor for the specific performance of a contract to convey the fee to her, and when the purchase money is paid, can compel the execution of a conveyance, in the absence of a covenant to do so sooner. The lessor encouraged the permanent improvement of property by tenants for years, in expectation of their being allowed to purchase the fee, and afterward contracted accordingly. *Held*, that the estoppel against his afterward refusing to convey the fee, on the ground that the plaintiff was a married woman, ran with the land, and a subsequent purchaser from him, advised of all the facts, was bound thereby. *Baine et ux. v. Bickett et ux.* 161.

See COMMON CARRIER, 2; CORPORATIONS, 1-5; COVERTURE, 1, 2; DEDICATION, 3; DOWER; EVIDENCE, 1.

## EVIDENCE—

1. The record of a judgment rendered in a court of the Confederate State of Arkansas, in November, 1861, against a citizen of the State of Ohio, is not competent evidence of indebtedness, although it may purport to show that process was served on the defendant prior to the commencement of the war. *Pennywit et al. v. Kellogg et al.* 17.
2. The Federal statutory prohibition of the admission of certain writings in evidence, unless stamped, applies only when such instruments are the predicates of an action, and does not affect their competency when introduced to establish merely a collateral fact. *Helman v. Reis*, 30.
3. The United States revenue act, passed June 30, 1864, and amended July 13, 1866, does not invalidate an unstamped instrument as evidence in a State court, where the circumstances of the case relieve the party suing thereon from the presumption that he intended to evade the internal revenue law. *Harris v. Trimble*, 108.
4. George W. Mayhugh owned a house and lot in Cincinnati, January 1, 1856, when he left his wife and children in Cincinnati, and departed from the State of Ohio, and was not heard of from February 15, 1859, to October 15, 1868, when he returned home. On February 8, 1867, when he had been absent and unheard of for eight years, his wife and children conveyed the house and lot in Cincinnati in ex-



Exemption—Insurable Interest.

change for a farm in the country. *Held*, in a suit by Mayhugh to recover the house and lot, that although his absence, unheard from, for more than seven years was a ground for presuming his death, yet that presumption was only *prima facie* evidence of his death, and was rebutted by his return, and that the deed of his wife and children was void. Upon the presumption arising from the seven years' absence, unheard of, the court of probate might have granted letters of administration of Mayhugh's estate and ordered a sale of his real property as of a deceased person, but his title could not be affected without legal proceedings. *Mayhugh v. Rosenthal*, 492.

See DAMAGES, 5; DEDICATION, 1; MUNICIPAL CORPORATIONS, 4; PRACTICE, 1.

EXEMPTION. See HOMESTEAD LAWS.

EXECUTORS. See ADMINISTRATORS.

FORCIBLE ENTRY AND DETAINER. See PRACTICE, 1.

FOREIGN ATTACHMENT. See DOMICILE.

FOREIGN CORPORATION. See PRACTICE, 14.

FOREIGN JUDGMENT. See EVIDENCE, 1.

FORFEITURE. See EQUITY, 1; TAXES, 1.

FRANCHISE. See CORPORATIONS, 5.

FRAUD. See PARTNERSHIP, 2, 3, 5, 6.

GRANT. See DESCENT AND DISTRIBUTION.

HOME PORT. See JURISDICTION, 1, 2.

HOMESTEAD LAWS—

Individual members of an insolvent copartnership, not the owners of other property, are severally entitled to the exemption allowed by the State "Homestead Laws," out of the partnership fund, even as against creditors of the firm. The object of exemption and homestead laws discussed and defined. *Gaylord et al. v. Imhoff et al.* 404.

HUSBAND AND WIFE. See COVERTURE, 2, 3; INSURANCE, 2.

ILLEGAL CONTRACT. See PRACTICE, 3.

INJUNCTION. See BOARD OF EQUALIZATION, 2; PRACTICE, 18.

INNOCENT PURCHASER—

Where an innocent purchaser has received a deed of general warranty, and has paid off and canceled on the record certain mortgages which he assumed as part payment of the purchase money, a court of equity will disregard such cancellation and hold the mortgages valid subsisting liens in the hands of the purchaser to protect him against the claims of junior incumbrances. *Cameron v. Holenshade*, 83.

INSURABLE INTEREST. See CONTRACT, 4, 10.

## Insurance—Judgment.

## INSURANCE—

1. Where a vessel is insured, negligence on the part of the officers in charge will not relieve the insurer from liability, unless their conduct has been fraudulent or barratrous. It is well settled that in all cases of loss, in determining the liability of the underwriter, the proximate and not the remote cause is to be considered. When a vessel is so injured as to cease to be of any value as a vessel, a total loss occurs, which fixes the liability of the insurer, even though there be no technical abandonment. In the United States a constructive total loss occurs when the cost of repair would exceed half the value of the vessel. The necessity of an abandonment may be constructively waived by the insurer. A claim of total loss made to the insurer, and an unconditional refusal by the insurer to pay the loss, is equivalent to an abandonment. Where the salvage of the wreck is not used for repairs, but in construction of a new vessel, no claim by the insurer of one-third new for old will be allowed. The non-compliance by the owners of the vessel with a statute prohibiting, under a pecuniary penalty, the carrying certain material without special license, can not affect the insurance on vessel or cargo. *Sherlock v. Globe Insurance Co.* 193.
2. A married woman suggested to her husband the taking out of a policy of insurance on his life for \$10,000, and gave him her own money to pay the first premium. The husband signed the application in his own name, and shortly after became bankrupt and died; but in all other respects the risk was in her own name, and in accordance with the intention of the wife, who paid the first and all the subsequent premiums out of her separate estate, for which the company issued receipts to her. *Held*, that this insurance is within the second section of the "act relating to insurance on life for the benefit of orphans and widows" (1 S. & O. 737), which allows the wife, by herself and in her own name, to insure her husband's life in any amount, for which she can pay the premiums out of her separate estate; and she is entitled to the insurance money, free from the claims of her husband's creditors. That in making the application the husband acted as the agent of the wife, which fact, on the face of the transaction, the company was bound to know. *Jacob v. Continental Life Insurance Co.* 519.

See CONFLICT OF LAWS, 2; CONTRACT, 3, 4, 6, 10.

INTEREST. See CONTRACT, 7.

JOINT CONTRACTOR. See PRACTICE, 3.

JOINTURE. See DOWER.

JUDGMENT. See CORPORATIONS, 5; COVERTURE, 2; ESTOPPEL, 1, 2, 6; EVIDENCE, 1; PRACTICE, 3.

Jurisdiction—Limitation of Actions.

JURISDICTION—

1. Maritime liens sought to be enforced by proceedings *in rem* are exclusively within the jurisdiction of the Federal courts. Contracts for supplies and repairs made at the home port of the vessel are not maritime liens; and proceedings *in rem* against such vessel, under the watercraft laws of a State, are not based on any maritime contract, but are purely statutory, and, therefore, cognizable in the State courts. *Dumont v. Steamer Petrel*, 27.
2. The ground on which an admiralty lien does not attach to a boat for supplies furnished in a home port, is that they are presumed to have been supplied on the personal credit of the owners. This reason applies to the residence of the owners rather than to the place of the registry. In determining the home port, for the purpose of deciding whether the case makes a maritime lien, the court will be governed by the residence of the owners. The seizure and sale by the sheriff of a boat within the jurisdiction of the United States admiralty court, on a warrant under the watercraft law of Ohio, are void, and the purchaser of the boat at the sheriff's sale is entitled to have the purchase money refunded. *Dowell et al. v. Steamer Melnotte*, 60.

See ESTOPPEL, 5; PRACTICE, 1.

JURY. See PRACTICE, 4.

JUSTICE OF THE PEACE. See PRACTICE, 1.

LANDLORD AND TENANT. See PRACTICE, 1; WARRANTY.

LEASE. See WARRANTY.

LIEN—

No lien is created upon the real estate of a corporation by the following certificate: "Ohio College of Dental Surgery. This may certify that Dr. A. J. Reeves is entitled to one share of the real estate property of the college, drawing an interest of six per cent., and transferable only in accordance with the constitution of the college association." A decree of sale of the property, founded upon said certificate, for the interest as a lien, is erroneous. *Bryant v. Ohio College*, 67.

See CONTRACT, 2; COVERTURE, 2; LIMITATION OF ACTIONS, 1.

LIFE ESTATE. See DESCENT AND DISTRIBUTION.

LIMITATION OF ACTIONS—

1. A suit to enforce the contractor's lien on real estate for paving and grading assessments is barred by the same limitation as a personal action to recover the debt. *Reynolds v. Green*, 262.
2. Showing when the statutes of limitation of other States may be pleaded, and in what manner. A verbal promise to pay a debt, barred by the statute of limitations of Ohio, is not sufficient to revive the original debt; such a promise must be in writing. *Cleveland v. Duryea's Adm'r*, 324.

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 Loan—Merger.
 

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3. The clause in the Code, which saves from the statute of limitations married women, until after their disability is removed, is constructively repealed, so far as such a suit is concerned, by the subsequent statute giving married women the right to sue alone for personal injuries at any time during coverture. A woman, married at the time the cause of action accrued, in a suit in her own name for personal injuries, is barred by the statute of limitations as if she were a *feme sole*. *Ong v. Sumner et al.* 424.
4. Where an action is brought for the recovery of lands situated in Ohio, by the plaintiff, who was a slave in Tennessee when the cause of action accrued, and the defendant pleaded the statute of limitations: *Held*, that slavery was a disability by imprisonment, and that the statute of limitations began to run only when that disability was removed. *Price v. Slaughter et al.* 429.
5. When a party claims to hold another as a trustee of personal property, under a mere constructive and not an express trust, of which he had notice, he must assert the claim within four years from the time when the trust is alleged to have originated, in analogy to the statute limiting actions for the detaining of personal property. *Raymond v. Moore et al.* 456.
6. If a cause of action, which has been pleaded as a set-off, accrued in the lifetime of the plaintiff's estate, the running of the statute of limitations was not interrupted by the death of the intestate against whom the action accrued. *Irwin v. Garretan*, 533.

See PLEADING, 7.

LOAN. See PARTNERSHIP, 5.

MARGIN. See BAILMENT, 2, 3; CONTRACT, 8.

MARITIME CONTRACT. See JURISDICTION, 1.

MARITIME LIEN. See JURISDICTION, 2.

MARRIED WOMEN. See COVERTURE; LIMITATION OF ACTIONS, 2.

MASTER COMMISSIONER. See PRACTICE, 8.

MASTER AND SERVANT—

In an action against a railroad company for injury done to one of its employes, through the want of repair or careless construction of a bridge, it is no defense that the employe knew beforehand the condition of the bridge, and in the discharge of his official duty ventured thereon. *Groff's Adm'r v. Cin. and Ind. R. R. Co.* 264.

MERGER—

D. mortgages certain real estate to C., his wife joining and releasing her dower. C. assigned the mortgage to S., and D. afterward conveyed to S. the equity of redemption, his wife not joining in the deed, and then died. *Held*, that as after the mortgage D. had but an equity of redemption, the conveyance thereof by him to S. merged the debt in the higher title, and did not revive the right of dower of the wife of D. in the premises. *Duval v. Febiger*, 268.

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Mortgage—Municipal Corporations.

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**MORTGAGE.** See **CORPORATIONS**, 2, 6; **ESTOPPEL**, 5; **RECOUPMENT**; **SUBROGATION**.

**MUNICIPAL CORPORATIONS—**

1. An ordinance to grade and macadamize a street, passed by the city council under the municipal corporation act of 1852, upon the report and recommendation of the board of city improvements, was valid, although the report and recommendation were not signed by the clerk of that board. *Fisher v. Graham*, 113.
2. Section 728 of the municipal code of 1869, providing that the "mayor, trustees, marshal, treasurer, and all officers elected" and in office under the act of 1868," should remain in their respective offices and perform the duties thereof, under the provisions of this act, until the time shall expire for which they had been elected, and until their successors should be chosen and qualified," did not save the office of "city commissioner," because the new code provided for the election of no officer who could be regarded as his successor, and his office was therefore abolished by the repeal of the act under which he was elected, and the enactment of the new code. *McHugh v. The City*, 145.
3. Where a city grades and paves a part of a street thirty feet in width along and within its corporation line, and an incorporated village adjoining said city at the same time grades and paves a part of a street thirty feet in width along and outside of said corporation line, but within the jurisdiction of said incorporated village, the two parts forming what is known to the public as one entire street sixty feet in width: *Held*, that by the act passed February 21, 1866 (S. & S. 803), the city has the power to make such improvement within the corporation line of said city, and to make assessments therefor upon property within the city abutting on said part of a street. That the fact that the assessment made by the two corporations are different in amount, but are uniform on the property within the jurisdiction of each, does not affect their validity, provided that no abuse of power is shown. *Scully v. The City*, 183.
4. The statute which declares that no ordinance for the improvement of a street shall be passed by the city council without the report and recommendation of the board of city improvements, requires that the report and recommendation shall be recorded in its proceedings and made to the city council; that such recommendation and report are jurisdictional; that parol evidence is not competent to prove them, and that upon evidence from the city records that such an ordinance was passed at a *joint session* of the council and board only, no presumption arises that the ordinance was passed at the recommendation and upon the report of the board of city improvements, as required by statute. *Reynolds et al. v. Schweinfus*, 215.
5. The plaintiffs were contractors with the city for grading and paving Cross street, under a contract "that compensation and payment for

## Negligence.

all work done, and materials furnished under the contract, should be made as specified in the ordinances of the city council regulating collection of special taxes for the improvement of streets," and not otherwise; and that the city of Cincinnati should not in any event be liable to pay for any part of the said work or the material used for the same, except such as may properly be chargeable upon the city property bounding or abutting on the said Cross street, agreeably to the provisions of the ordinance aforesaid. After the work was done, the assessment was duly made and assigned, in pursuance of the contract, to the plaintiffs, and by them accepted, in consideration whereof they released the city from all claim on account of the work done and materials furnished under the contract for doing said work. *Held*, that the city was not liable to an action by the contractors for the excess of the assessment above fifty per cent. of the value of a lot abutting on the street, which excess the contractors had failed to recover against the owner of the property. *Ryan v. The City*, 245.

See BOARD OF EQUALIZATION, 1; CONSTITUTIONAL LAW, 3; ESTOPPEL, 5.

## NEGLIGENCE—

1. It is not actionable want of care in a driver of a horse car along a street to fail to prevent a horse from approaching, unseen by him, the side of the car, after the front part of the car has passed, so as to receive injuries from the rear wheel of the car on that side. Where the driver, standing on the front platform of such car, keeps a close watch forward, and is vigilant to see and avoid obstructions near or approaching the track, he is not guilty of negligence in omitting also to keep a constant watch of each side of the car to the rear of the front platform, to see that no one is injured by coming laterally into collision with the side or the rear wheels of the car. But if, as the car is passing, the driver sees a horse loose in the street, dangerously near to and approaching the track backward, retreating from a boy who is endeavoring to get control of him, it is his duty to stop the car, and if he goes on and the horse is injured by the rear wheel of the car, the company would be liable unless the plaintiff has been guilty of contributory negligence; and in such a case it is a question for the jury to decide. *Lawrence v. Pendleton Street R. R. Co.* 180.
2. Goods were lost while on a side-track of the defendant's line, and this was claimed to be sufficient proof of negligence; but this is too remote. The maxim *causa proxima non remota spectatur* applies to this as to other contracts. *Childs v. Little Miami R. R. Co.* 480.
3. Section 30 of the act of Congress of 1852 does not expressly or impliedly relieve the proprietors of steamboats from the presumption of negligence, which, under section 13 of the act of 1838, arises from the simple fact of explosion. The averment of a strict compliance, on the part of the proprietors of steamboats, with all the require-

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Negotiable Paper—Partnership.

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ments of the act of 1852, without averring care and denying negligence, is not a good defense to the allegation of loss by an explosion caused by negligence. *Curran v. Cheeseman et al.* 52.

See INSURANCE; MASTER AND SERVANT; PLEADING, 1, 6.

NEGOTIABLE PAPER. See CONTRACT, 9.

NEW TRIAL. See PRACTICE, 17-21.

NEXT FRIEND. See LIMITATION OF ACTIONS, 3.

NON-RESIDENT. See DOMICILE.

NOVATION—

1. The taking a clearing-house manager's warrant for the surrender of a check, if the check be afterward dishonored, is not payment of the check, unless made so by special agreement, or by *laches* on the part of the holder. *Merchants National Bank v. Procter & Gamble*, 1.
2. A., the holder of a bank check drawn by B. on C., presents it on the day of its date, at the clearing-house, and, after adjustment of the accounts between the various banks (his own among the number), receives, in settlement, the warrant of the manager of the clearing-house on C. The next day, A., having presented the manager's warrant to C., who refuses payment, the original check is obtained from the clearing-house, presented to C., dishonored, protested, and notice thereof given to B. *Held*, that B. is liable to A. for the amount of the check. *Ibid*.

See PARTNERSHIP, 4.

OCCUPYING CLAIMANT LAW. See RECOUPMENT.

ORDINANCE. See MUNICIPAL CORPORATIONS, 1-4.

PARTIES. See PRACTICE, 18.

PARTNERSHIP—

1. A., one of two copartners, without the authority of B., his partner, formed, in the firm name, another copartnership with C., without the authority or knowledge of B. *Held*, that A. exceeded his authority as partner, and was legally liable to B. for loss resulting from such unauthorized act. *Hellman v. Reis*, 30.
2. The members of a firm are jointly liable for the fraud and misrepresentations of one partner made in the course of the partnership business, though without the knowledge of the other partners. *Royer et al. v. Aydelotte*, 80.
3. Miller gave money to Robbins to invest in leaf tobacco, with a verbal agreement that they should share the profits equally, saying nothing about losses. Robbins used the money to pay his own debts and bought tobacco in the name of Miller, giving his own acceptances for the purchase money, and pledging the tobacco for the payment of the acceptances to the defendants, who gave a bill of sale receipted in the name of Miller, which Robbins gave to Miller. Miller

## Partnership.

was unknown to defendants, and they were informed by Robbins that the purchase was for himself, though made in Miller's name. *Held*, that Miller and Robbins are to be regarded as partners in the purchase of the tobacco, and that Miller was bound by the agreement of Robbins pledging the tobacco to secure the payment of his acceptances for the purchase money; that the defendants were not responsible to Miller for the misapplication by Robbins of the money he had received from Miller; that the receipted bill given by the defendants in the name of Miller, on receiving the acceptances of Robbins, was open to explanation, and did not estop the defendants from holding the tobacco to secure the payment of the acceptances according to their agreement with Robbins. *Miller v. Sullivan et al.* 271.

4. L., C. & Co. and Q. & Co. exchanged notes for the accommodation of the former, who negotiated in bank Q. & Co.'s note. When due it was renewed. Before its maturity, L., C. & Co. dissolved partnership, L. retiring, and the remaining members of the firm formed a new partnership under the style of C. & Bro., and assumed the liabilities of L., C. & Co. When the renewed note fell due, it was again partly renewed by C. & Bro.'s note, indorsed by Q. & Co., and the balance paid in cash by C. & Bro., all without L.'s assent. This last note was protested for non-payment, C. & Bro. having become insolvent. Through all these transactions, Q. & Co. retained the original note of L., C. & Co. as security. In a suit by Q. & Co. against L., C. & Co. upon their original note, under section 500 of the Code (2 S. & C. 1095): *Held*, that L., the retiring partner, can not claim that the change of securities in the hands of the bank operates as a release of him, on the ground of a payment, or of an extension, without his consent, of the original debt in the hands of Q. & Co. sued on. *Held*, that such a change of securities did not suspend the right of action, which Q. & Co. have on the original debt of L. C. & Co. to them. *Little v. Quinn et al.* 379.
5. T., P. & Co. had been in the habit of obtaining loans from the plaintiffs. On the admission of another partner the business of the firm was changed, and also the firm name to P. & Co., T. being still a partner. T. obtained a loan from plaintiffs, giving a note in the old firm name of T., P. & Co., and converted it to his own use, no knowledge of the change in the firm name being brought home to the plaintiffs, or of T.'s fraud to the defendants. *Held*, that the plaintiffs might recover the amount loaned T. from the other partners. *Sorg et al. v. Thornton et al.* 383.
6. K. and F., partners, dissolved, F. buying out K.'s interest, giving his note therefor. F. insured, and a loss by fire occurred. The firm at the time, without the knowledge of either, was insolvent. Judgment against F. was recovered on the note, and a lien obtained on the insurance money, when the judgment was assigned in payment



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 Payment—Pleading.
 

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of K.'s individual debts. The plaintiff, a firm creditor, afterward claimed to subject the same fund. *Held*, that the firm creditors had no lien on the firm property to prevent a valid sale thereof. That such a valid sale might, *bona fide*, take place as between partners as well as to strangers. That the purchase and sale, as between F. and K., was not a fraud on firm creditors. That K.'s judgment was entitled to be satisfied from F.'s assets in its order of priority, and that the assignees had a better equity than the plaintiff. *Pferrmann v. Koch et al.* 460.

See HOMESTEAD LAWS; PAYMENT; PRACTICE, 9; SET-OFF.

#### PAYMENT—

The holder of a firm note, after a dissolution of the firm, received the individual note of one partner for the amount without new consideration. Payments on account were made on the second note. *Held*, that the second note was not a payment of the first, nor an extinguishment of the firm liability. *Keating v. Sherlock et al.* 257.

See CORPORATIONS, 3.

PERJURY. See ESTOPPEL, 2.

#### PLEADING—

1. Section 30 of the act of Congress of 1852 does not expressly or impliedly relieve the proprietors of steamboats from the presumption of negligence, which, under section 13 of the act of 1838, arises from the simple fact of explosion. The averment of a strict compliance, on the part of the proprietors of steamboats, with all the requirements of the act of 1852, without averring care and denying negligence, is not a good defense to the allegation of loss by an explosion caused by negligence. *Curran v. Chessman et al.* 52.
2. In a suit on a promissory note, the answer was that "the defendant denies all the allegations of the petition." *Held*, that such an answer was equivalent to the general issue, and did not authorize, under the Code, proof of special matter by way of defense. *Hauser v. Metzger*, 164.
3. C. brings replevin against B., who, in his answer and cross-petition, sets up an equitable defense and claim to the property. C. replies; and in his answer to this cross-petition pleads a set-off, and demands judgment for money only arising from other transactions on an account stated. *Held*, that such a claim was not included in the provisions of section 80 of the Code, and could not be pleaded as a set-off in this action. Damages for which an action for money had and received or *indebitatus assumpsit* can be maintained, may be pleaded as a set-off. *Corbin et al. v. Bouve*, 259.
4. A. says of B., a married woman, "She is not a decent woman; she had a bastard child by her husband before her marriage," etc. *Held*, on demurrer, that the words were actionable *per se*, and no special damage need be averred. *Murray v. Murray*, 290.

## Policy—Practice.

5. Under the Code, alternative relief may properly be asked in a petition and granted by the court. *Globe Insurance Co. v. Boyle et al.* 444.
6. In an action against a common carrier for goods lost during transit, where, instead of merely declaring on the contract, the plaintiff has alleged negligence on the defendant's part, which was traversed by the defendant, the burden of proof of such negligence is on the plaintiff, and mere presumption of negligence, because there was a loss, is not enough to authorize a recovery, where there is rebutting proof. *Childs v. Little Miami R. R. Co.* 490.
7. The statute of limitations may be pleaded against a set-off. If the facts constituting a bar by the statute of limitations appear on the face of the pleading, it may be taken advantage of, either by a general demurrer or by an answer setting up the statute; but if not met by one or the other, the defense of the statute is waived. *Irwin v. Garretson*, 533.

See ESTOPPEL, 7; LIMITATION OF ACTIONS, 2; PRACTICE, 2.

POLICY. See CONFLICT OF LAWS, 2; CONTRACT, 1, 3, 4, 6, 10.

## PRACTICE—

1. Mowry, the lessor, who alleged that his tenant was holding over, under a parol lease from month to month, brought an action of unlawful detainer before a justice of the peace, against Petsch, the tenant, to recover the possession of certain premises. Petsch claimed to hold under a parol lease for three years; and upon the hearing, Mowry obtained judgment of restitution. During the trial no exceptions were taken by Petsch, and he took no appeal. When the writ of restitution was about to be executed, Petsch, upon petition to this court, obtained an injunction to prevent its execution, upon the ground that according to section 10, justices' act (1 S. & C. 772), the justice had no jurisdiction to declare a forfeiture of his lease. Mowry answered the petition, denying its allegations, and alleged the tenancy from month to month, the holding over, and the insolvency of Petsch, and set up the judgment in detainer. *Held*, 1. That whether or not there was such a tendency as the plaintiff in detainer claimed, and the party was holding over his term, were questions of fact for the determination of the justice, and this court, not being a court of error or appeal in detainer, is bound by it. 2. That the action of unlawful detainer is a possessory action merely; and that sections 10 and 126 of the justices' act must be so construed as to harmonize the act and support the jurisdiction of justices in the action. 3. That in actions of unlawful detainer, the nature of the plaintiff's title, whether in fee simple or for years, is immaterial. Proof of his possession, at the time of creating the tenancy and delivery thereof to the defendant, is sufficient to support the action, and the defendant can not, by the introduction of proof of title, defeat it. 4. Title, in the legal construction of section 10, justices'

## Practice.

- act, does not mean title by mere possession which only the plaintiff need prove. 5. The tenant having other remedies under the act relating to actions in detainer (1 S. & C. 791), *quære*, whether this court can interfere in such a case as this, where he has not chosen to avail himself of them? *Petsch v. Mowry*, 36.
2. In a suit by a contractor against the city for a balance claimed as due for many items of work done and material furnished in building the Commercial Hospital, the petition stating an account of many items and payments, and the answer denying its correctness, but averring that the account was of an intricate character such as could not be taken, except in a court of equity: *Held*, that prior to the Code, this would have been a subject for a proceeding at law or in equity, as the plaintiff might elect, and no order of reference could, without consent of parties, have been granted in a proceeding at law; but that under the Code, the parties are entitled to both equitable and legal remedies, according to the nature of the subject-matter of the action, and an order of reference may properly be made, as in equity, to take and state an account between the parties. *Stanley v. City*, 69.
  3. In an action against joint contractors, a judgment in favor of one operates as a discharge of the other. A. & B., partners as A. & Co., were sued on a partnership contract. B. answered, and A. was in default. The court below held the contract to be illegal, and gave judgment in favor of B., but judgment by default against A. *Held*, it was error to discharge one and not both. *Pfau et al. v. Lorain et al.* 73.
  4. When depositions or other written evidence have been offered and read to the jury, it is error in the court to hold that such evidence shall not be taken by a jury with them on their retirement. Whatever may have been the practice in other States, or in England, it always has been the admitted right of the jury in Ohio, at least in the southern part of the State, to examine, on their retirement, all such evidence as may have been read to them. *Post et al. v. Gaslay*, 105.
  5. In a proceeding in error to reverse an order dismissing an order of attachment of property of a non-resident, no bond was given according to the statute of February 13, 1861. *Quære*. Is this proceeding in error well taken? *Smith et al. v. Coleman et al.* 150.
  6. When, by consent of both parties, a jury is waived, and a cause submitted to the court, neither party can subsequently withdraw his waiver and demand a jury, unless for special reasons to be determined by the court. *Hauser v. Metzger*, 164.
  7. Where an action was for money and for special and general relief, and an account of partnership transactions was asked, and a reference was ordered, an account taken, and a report made and confirmed, the taxing and apportionment of costs were, in the discretion of the court, under section 554 of the Code. Where a judgment was rendered on such a report for the plaintiff, without any allow-

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 Practice.
 

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- ance of compensation to the referee, the judgment as to the costs was irregular, and the court had power, on a motion of the referee made at a subsequent term, to modify the judgment as to costs, and allow a reasonable fee, and order the plaintiff to pay it. *Lampton v. Nichols*, 168.
8. The report of a master commissioner, under the Code, is liable to be reviewed on exceptions, "and confirmed, modified, or set aside" by the court, in the same manner and to the same extent as was the report of a master in chancery before the Code; it does not stand upon the same footing with the verdict of a jury or finding of a referee in a proceeding at law, to be set aside only on a showing which would warrant the setting aside of a verdict of a jury rendered in a trial at law. *Williams v. Stevens*, 176.
  9. Where several attachments were levied upon the property of an insolvent firm at different times, so that the later ones would take nothing by the writ, and one of the partners sues the other for the purchase money of an alleged previous sale, and procures the appointment of a receiver, and asks that the partnership property be worked up and sold, and the proceeds be distributed *pro rata* among the creditors who are made defendants, served with process and are in default, the receiver having entered upon the discharge of his duty, and one of the later attaching creditors, a defendant, afterward institutes proceedings in bankruptcy to compel a *pro rata* distribution of the partnership effects, and the assignee interferes with the receiver, and attachments for contempt are served on said creditor and assignee: *Held*, that the receiver has proper custody of the property for the preservation thereof, for the common benefit, and may proceed to administer the same under the instruction of the court, according to his appointment, and that the hearing of the proceeding in contempt will be postponed till he is disturbed in the performance of his duties or the final hearing of the case. *Eisenmann v. Thill* 188.
  10. It is not a valid objection to the report of a referee that it does not contain exceptions taken to his rulings, when there is no evidence that the party complaining took any exceptions and requested them to be reported or preserved. If the referee, in his report, has found the amount due from the defendant to the plaintiff as a matter of fact, and that the plaintiff is entitled to a judgment for that amount as a matter of law, the defendant can not claim to have the report set aside on the ground that the referee has not returned his finding of fact and law separately. Where all the issues are referred to a referee, the prevailing party need not give notice of the report, or furnish to the other party a copy of it. A judgment may be entered upon it as upon a verdict of a jury, without a motion. *Riley v. Coghill*, 241.
  11. On motion to dissolve an injunction, the court granting the motion

## Practice.

- ordered a bond of indemnity to be given by the defendants to the party who had obtained the restraining order, to save the plaintiffs harmless and be liable for future damages. On the plaintiffs seeking to reverse the order on writ of error: *Held*, that it was not a final order or judgment to which, under section 512 of the Code, a writ of error could lie. *Cincinnati College v. The City et al.* 255.
12. A proceeding is not affected by the fact that the sheriff is unnecessarily a party thereto. He should be dismissed. *Corbin et al. v. Bouve*, 259.
  13. On January 11, 1867, G. transferred his stock of dry goods to D. On January 12, 1867, S. & Co., creditors of G., attached the goods as his property, under a claim of \$2,000, on the ground that G. had disposed of his property with intent to hinder, delay, and defraud his creditors. D. took the goods in replevin, giving his replevin bond, with sureties, in the sum of \$10,000. On May 20, 1869, while the cause was pending, S. & Co. filed a cross-petition setting forth the insolvency of G. at the time of the transfer to D., and giving the names of creditors and the amounts of their claims, in the aggregate \$18,000, while the entire assets of G. were only \$8,000, and alleging that the transfer was made to hinder, delay, and defraud his creditors, and asking, under section 17 of the assignment act, that the transfer be declared void, and that the assets might be administered by an assignee for the benefit of the creditors. Motion to strike out the cross-petition having been overruled, and the jury having returned a verdict for the defendants against the validity of the transfer, and found the value of the property to be \$7,500, which, by decree, was distributed among the creditors: *Held*, that the court did not err in overruling the motion to strike out the cross-petition; that the bond took the place of the property, and that the recovery on the cross-petition was not limited to the amount of the claim of the attaching creditors, but covered the entire value of the property replevied, as found by the jury. *Dougherty v. Schlotman et al.* 292.
  14. The amendment to section 66 of the Code does not repeal section 68, and under section 68 service on the general freight agent, of a foreign corporation is sufficient. *W. P. and C. Trans. Co. v. B. and O. R. R. Co.* 311.
  15. Where it was ascertained, after the trial of a cause had commenced, that one of the jurors had sat upon a former trial of the same cause, and the court thereupon offered to discharge the jury and continue the case, but the plaintiff, against whom the former verdict had been rendered, consented to go on with the jury as it was, the plaintiff could not, after the verdict was again rendered against him, object to its validity on the ground that said juror was in the panel. *Williams v. Trus et al.* 321.
  16. On a trial before a referee, who rendered a judgment on a counter-claim in favor of the defendants, the plaintiff made a motion for a

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 Premium—Priority.
 

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- new trial and took no bill of exceptions; but, after the referee's report was filed, made exceptions thereto, which the court overruled, and rendered judgment for the amount found due by the referee in favor of the defendants—to all which the plaintiff excepted, but took no bill of exceptions: *Held*, that there is nothing in the record properly before the court which can be noticed on error. *Wesselburg v. Eberhardt et al.* 341.
17. A new trial will be granted on the ground of newly-discovered evidence, where it is not multiplication of evidence to facts already investigated, or addition to other facts of the same general nature. *Hurd et al. v. French*, 385.
  18. Where it is apparent that the injury to the plaintiff's rights had all been done by the acts of others than the defendants before suit, an injunction will not lie to restrain them from acts which will work no injury. An alleged injury to the bare right of navigating the basin of a canal, which is doubtful, and which has been rendered impossible or of no value by the acts of others than the defendants, is *damnum absque injuria*, and the remedy by injunction unwarranted—the injury which the party apprehends must be real. Where this alleged right has been lost by non-user or lapse of time, an action by injunction to restrain apprehended injury thereto can not be maintained. *Erkenbrecher v. Este et al.* 368.
  19. In the assignment of errors in a bill of exceptions, the error sought to be assigned must be distinctly pointed out, otherwise it will be held to have been waived. *Schoenfeld et al. v. Heman et al.* 401.
  20. Where the sheriff returned a sale of real property on execution to Wenstrup for two-thirds of the appraisement, but that the purchaser had refused to pay the purchase money, and the plaintiff in execution moved the court to confirm the sale, but the court overruled the motion and set aside the sale: *Held*, that the motion was addressed to the sound discretion of the court, and that no such abuse of the judicial discretion was shown as to constitute error in this case. *Marshall et al. v. Flinn*, 415.
  21. The granting of a motion for a new trial, made at the term of the trial, within the time prescribed by the rules, is within the discretion of the court, and ordinarily will not be reversed on petition in error. An order dismissing the case without prejudice, after the new trial granted, will not be reviewed on a petition in error, unless there is a bill of exceptions showing the evidence before the court upon which it acted. *Müller v. Simms et al.* 485.

See BOARD OF EQUALIZATION, 2; CORPORATIONS, 2; DOMICILE; ESTOPPEL, 7.

PREMIUM. See CONTRACT, 6.

PRESUMPTION. See EVIDENCE, 6.

PRIORITY. See CONTRACT, 2; PARTNERSHIP, 6; PRACTICE, 9.

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 Probate Court—Sale.
 

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PROBATE COURT. See ESTOPPEL, 4.

PROMISSORY NOTE. See PARTNERSHIP, 4.

PROXIMATE CAUSE. See INSURANCE.

PUBLIC OFFICER. See MUNICIPAL CORPORATIONS, 2.

RAILWAY. See BAILMENT, 1; CONSTITUTIONAL LAW, 3; CORPORATIONS, 1; MASTER AND SERVANT; NEGLIGENCE, 1, 2.

RECEIVER. See PRACTICE, 9.

RECORD. See ESTOPPEL, 4, 5; EVIDENCE, 1.

RECOUPMENT—

1. Where a partition of lands among heirs was effected by a sheriff's sale, and a part of the property was purchased by one of the heirs, who afterward sold and conveyed it, at private sale, to a purchaser, who entered into possession and made valuable improvements without any actual knowledge of the equitable lien for the purchase money in favor of the other heirs, who stood by and saw such purchaser make the improvements without advising him of the lien: *Held*, that such purchaser, at private sale, was entitled to the benefit of the occupying claimant law, as against the lien, and to be reimbursed out of the proceeds of a resale of the property in a suit afterward brought by the other heirs to enforce the lien, to the extent of the value which he had added to the property by the improvements. *Cameron v. Holenshade*, 84.
2. Before administration, the widow and only son of an intestate conveyed by deed the deceased's realty to H., who gave a note, secured by mortgage on the premises, for the unpaid purchase money. Subsequently the son took out letters of administration, was sued as administrator, and a judgment recovered against him, which, after an order for a sale of the same realty, made by the probate court, H. offered to pay. On suit brought by M., a holder before maturity, for value, of H.'s note and mortgage, to foreclose: *Held*, that H. was entitled to recoup the amount of the judgment from the amount due on the mortgage to M. *Heller v. Meiss et al.* 477.

PREFACE. See PRACTICE, 2, 7, 10, 16.

REFORMATION OF CONTRACT. See CONTRACT, 3.

REPEALING STATUTES. See LIMITATION OF ACTIONS, 3; MUNICIPAL CORPORATIONS, 2.

REPLEVIN BOND. See PRACTICE, 13.

SALE—

1. A transfer by delivery, of a bill of lading, for a *bona fide* consideration paid, passes the title of the consignee to the property described, whether the bill is indorsed or not. A., consigning goods to B., drew drafts on B., and attaching thereto the bills of lading, describing the property, sold the drafts to C. B., having received

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 Salvage—Shareholder.
 

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the goods, applied the proceeds to his claims against the consignor, and refused to accept the drafts. *Held*, the title to the goods passed, by the transfer of the bill of lading, to C., and that B. was liable to him for the amount of the drafts. *Irving National Bank v. Thomas Emery's Sons*, 76.

See CORPORATIONS, 5; PARTNERSHIP, 6.

SALVAGE. See INSURANCE.

SERVICE. See PRACTICE, 14.

SET-OFF—

*Homans & Co., Bankers*, of Cincinnati, held several notes of R. Hemingray, made in Kentucky, and R. Hemingray & Co., of which R. Hemingray was the principal partner, kept their bank account with Homans & Co. By mutual arrangement of the members of the firm, R. Hemingray did his individual banking business in the name of R. Hemingray & Co., and kept no bank account in his individual name. Homans & Co., while in good credit, without the knowledge of Hemingray, or Hemingray & Co., transferred, by indorsement, his notes to the plaintiff as collateral security for a loan of money, and afterward became insolvent before Hemingray was notified of the transfer. Hemingray & Co. had on deposit with Homans & Co. \$10,000, which R. Hemingray was authorized to use to pay his notes, one of which was due in July, 1869. *Held*, that the notes being Kentucky paper, and subject to Kentucky law, were subject to set-off in the hands of the plaintiff in like manner as if they were in the hands of Homans & Co. That separate and joint claims can not ordinarily be set off against each other, either at law or in equity, but that where there is a natural equity in favor of such a set-off, and the separate party becomes insolvent, equity will, to protect such natural equity, permit a set-off to the extent of the interest of the partner in the joint claim. *Held*, also, that when there is super-added a course of business, showing that the parties treated the joint claim as the individual property of the partner who seeks to make the set-off, or when there is a contract or an understanding to that effect between the parties, such set-off will be permitted. That a check by R. Hemingray & Co. for a part of their deposit account to R. Hemingray, made on the day of the failure of Homans & Co., but before notice of the transfer of his notes to the plaintiff, was valid to vest the fund in R. Hemingray, so that he could set it off against his notes in the hands of the plaintiff, notwithstanding Homans & Co. were then insolvent and afterward were declared bankrupts, and that Homans & Co. being insolvent, R. Hemingray will be allowed to set-off said fund against the notes not due as well as against the note which was due. *Second National Bank v. Hemingray et al.* 435.

See LIMITATION OF ACTIONS, 6; PLEADING, 3, 7.

SHAREHOLDER. See CORPORATIONS, 2, 3, 5; LIEN, 1.



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 Sheriff—Statute of Frauds.
 

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**SHERIFF—**

Under section 168 of the justices' act (1 S. & C. 799), a demand of jail fees by the sheriff from the creditor, and a refusal by him, are not necessary to justify the discharge of a prisoner. The creditor must pay the sheriff's fees without demand or notice from that officer. *Newcomb et al. v. Weber*, 12.

**SHERIFF'S RETURN.** See **ESTOPPEL**, 5.

**SHERIFF'S SALE.** See **PRACTICE**, 20.

**SLANDER.** See **PLEADING**, 4.

**SLAVE.** See **CONFLICT OF LAWS**; **LIMITATION OF ACTIONS**, 4.

**SPECIFIC PERFORMANCE—**

1. That where one party refuses to recognize the terms of a contract or to be bound thereby, it is sufficient for the other party, in a suit of specific performance, to prove ability, readiness, and willingness to perform the contract on his own part. No tender need be proved if it were certain to be refused. *Bickett et ux. v. White*, 170.
2. A. leased lands to B. by deed, with covenants that B. should pay all taxes and assessments, and rent quarterly—lease to be forfeited by default in payment of rent—with privilege of purchasing the fee within the term. The lessee made default in paying rent and taxes; the lessor entered and sold the fee. Subsequently, before the expiration of the term, the heirs of B. tendered the contract price for the fee, which was refused. On their suit for specific performance: *Held*, that the payment of the rent and taxes was a condition precedent on the lessee's part to the exercise of his option to purchase; that the non-payment of rent and taxes was such a default as barred him from asking specific performance. *Parry's Heirs v. Tobacco Insurance Co. et al.* 251.

See **COVERTURE**, 1; **STATUTE OF FRAUDS**, 2.

**STEAMBOAT LAWS.** See **PLEADING**, 1.

**STAMP.** See **EVIDENCE**, 2, 3.

**STATUTE.** See **CONSTITUTIONAL LAW**, 2; **SHERIFF**, 1.

**STATUTE OF FRAUDS—**

1. A. was father-in-law of B., and associated with him as a partner in the practice of law, and while that relation existed, they acquired a house and lot by way of compensation for legal services rendered by the firm, the title of which was taken to A., but B. went into the possession. A. died, and his widow claimed the whole under the will; and B. also claimed the whole, viz: one-half on the ground that it had been paid for by the firm, and the other half by a verbal contract and transfer made by A. to B. while B. was in possession as tenant in common. *Held*, that B., as tenant in common of an undivided half of the house and lot, could not acquire a title to the other half by a parol agreement; with his co-tenant, there being no

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Stock, Certificates of—Ultra Vires.

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such part performance, by change of possession or otherwise, as to take the case out of the statute of frauds. *Flinn v. Manning*, 110.

2. A., seized of lands occupied by his lessees for terms of years, conveys the fee to B. Subsequently, in B.'s presence, and with his oral acquiescence, A. gives a promise in writing to the tenants of a privilege of purchase of the fee by them on easy terms. B. afterward refuses to recognize the agreement. *Held*, that under the circumstances A. acted as the duly authorized agent of B., and the written promise was good within the statute of frauds. That a written agreement, signed by the party to be bound thereby, though only accepted orally by the other party, is good within the statute, and that there is, in such a case, no such want of mutuality as to invalidate the contract. *Bickett et ux. v. White*, 170.

See ESTOPPEL, 7; SPECIFIC PERFORMANCE, 1.

STOCK, CERTIFICATES OF. See LIEN, 1.

STOPPAGE IN TRANSITU. See COMMON CARRIER, 2.

SUBCONTRACTOR. See CONTRACT, 2; ESTOPPEL, 7.

**SUBROGATION—**

Where a mortgage was lost in its transmission by mail to an attorney for collection, to whom sundry payments were made reducing the mortgage debt to \$1,500, and the mortgagor afterward made a note for \$500, to the order of the attorney, taking a receipt that when paid the amount should be credited on the mortgage; and, afterward, a third person took up the mortgage, and, by agreement with the mortgagors, included the \$500 note, and extended the time of payment two years, as evidenced by a new note for \$1,500, and also agreed that the mortgage should stand as a security for the debt, and that when the new note was paid it should be canceled: *Held*, that here was an equitable assignment of the mortgage, which covered the amount of the \$500 note, and that the third person, who paid to the holder the amount due on the mortgage, is entitled to be substituted in the place of the original mortgagee, and to hold the land as if he were his assignee. *Cook et ux. v. Shiras*, 398.

SURPRISE. See ESTOPPEL, 2.

**TAXES—**

The forfeiture of a particular estate to the reversioner, under section 76 of the tax law (2 S. & C. 1464), is but an inchoate right until decreed by a court of competent jurisdiction. *Johnson v. Pettit*, 25.

See AUDITOR OF COUNTY; BOARD OF EQUALIZATION, 2.

TELEGRAPH. See COMMON CARRIER, 1; DAMAGES, 2.

TITLE. See PRACTICE, 1.

TOTAL LOSS. See INSURANCE.

TORT. See COVERTURE, 3.

ULTRA VIRES. See CORPORATIONS, 1.

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Usury—Writ of Error Bond.

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USURY. See CONTRACT, 7.

VENDOR AND VENDEE. See CORPORATIONS, 1; SALE.

WARRANTY—

The words "grants, demises, and leases," in the absence of other covenants in a lease, imply a general warranty of quiet possession to the lessee. But where there is a covenant for quiet enjoyment, as regards the lessor or those claiming under him, no such general warranty exists. The implied covenant can not be broader than the express covenant. The grantee of the equity of redemption, in property mortgaged by a former owner, leased the premises with the above covenant. The mortgagee foreclosed, and ousted the lessee. *Held*, the lessee had no right of action against his lessor. *Tooker v. Grotenkemper*, 88.

See CONSTITUTIONAL LAW, 2; DAMAGES, 1-5.

WATERCRAFT LAWS. See JURISDICTION, 1.

WIDOWS AND ORPHANS. See INSURANCE, 2.

WRIT OF ERROR. See PRACTICE, 9.

WRIT OF ERROR BOND. See PRACTICE, 5.







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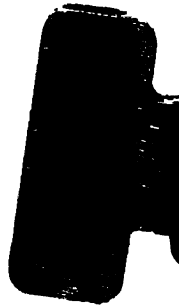












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